Petition

81-509

NO. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

DUWAMISH, SAMISH, SNOHOMISH,
SNOQUALMIE and STEILACOOM TRIBES,
Intervenor-Petitioners,

v.

STATE OF WASHINGTON, et al.,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Was it proper for the court of appeals to affirm the district court, rather than remanding for further proceedings, when the court of appeals ruled that the district court had applied incorrect legal standards to determine a disputed factual question of whether five Indian tribes continue to hold and possess treaty fishing rights?

2. Did the court of appeals in effect require federal administrative recognition for a tribe to retain reserved treaty fishing rights in conflict with legal standards which prohibit requiring such recognition?

3. Does the court of appeals' decision conflict with this Court's decision in United States v. John, 437 U.S. 634 (1978) by applying an incorrect test to determine whether the petitioner tribes are so assimilated that they cannot

hold treaty rights?*

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* A list of all parties to the proceeding can be found in Appendix D.

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DUWAMISH, SAMISH, SNOHOMISH,
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Intervenor-Petitioners,

v.

STATE OF WASHINGTON, et al.,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom Indian Tribes request that a writ of certiorari issue to review the opinion of

the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 20, 1981. This action arose as part of the continuing litigation of United States v. Washington to determine the fishing rights of certain tribes in the Pacific Northwest. The petitioners intervened in this case in 1974 to protect and affirm their treaty reserved fishing rights. The ultimate issue in this appeal is whether these tribes enjoy the same treaty reserved fishing rights as twenty other tribes in Western Washington whose treaty rights have already been affirmed.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 641 F.2d 1368 (1981). The opinion for the district court for the Western District of Washington is reported at 476 F.Supp. 1101 (1979). Both opinions are set out in Appendix A.

JURISDICTION

The opinion of the Ninth Circuit was filed on April 20, 1981 and corrected by court order on April 22 and June 8, 1980. See Appendix at B-1. The petitioners herein filed a petition for rehearing and suggestion for rehearing en banc on May 1, 1981. This petition was denied by the Ninth Circuit Court of Appeals on June 5, 1981. See Appendix at B-3. On August 21, 1981 Assocate Justice William H. Rehnquist entered an order extending the time for filing this petition to September 11, 1981. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND TREATY AND FEDERAL RULE PROVISION

The Treaty of Point Elliott, 12 Stat. 927 (January 22, 1855 ratified March 8, 1859). The Treaty of Point Elliott, signed by the Duwamish, Samish, Snohomish and Snoqualmie Tribes, is set out in the

the Appendix at C-1.

The Treaty of Medicine Creek, 10 Stat. 1132 (December 26, 1854 ratified March 3, 1855). The Treaty of Medicine Creek, signed by the Steilacoom tribe, is set out in the Appendix at C-14.

Federal Rules of Civil Procedure, Rule 52(a):

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...

STATEMENT OF THE CASE

1. The Nature of the Case

Petitioners are seeking review of the Ninth Circuit Court of Appeals' opinion

which found that the district court applied the wrong law to the facts in determining whether the petitioners remain treaty tribes. The Ninth Circuit found that the court had erred by making federal recognition of the tribes a precondition to the exercise of treaty rights. However, despite the district court's reliance on incorrect legal standards, the circuit court held that the court's findings were not clearly erroneous.

Certain facts have been stipulated to by a.l parties in this case. It is agreed that each of the petitioner tribes is composed primarily of descendants of persons who were members of their respective Indian tribes that signed the treaties of Medicine Creek and Point Elliott. Furthermore it is agreed that the Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom Tribes were each originally a party to one of these two treaties negotiated with the

United States in the 1850's. The only question is whether each petitioner has lost its status as a treaty tribe in the intervening years.

Unless changed by this Court the operative result of the decision below is to abrogate the petitioners' treaty rights which they have exercised since the 1850's with the United States governmental acquiescence. 1/

1/ The jurisdiction of the district court is based on 28 U.S.C. §1345, in that the United States brought the action on its own behalf and on behalf of federally recognized Indian tribes in connection with its administration of Indian affairs; 28 U.S.C. §1331, in that the matter in controversy involved the fishing rights of each of the intervening plaintiff tribes which were claimed to exist and to be secured under the Constitution, laws and treaties of the United States, such rights exceeding in value the jurisdictional amount; 28 U.S.C. §1343(3) and (4), in that the plaintiff-intervenor tribes alleged that the State of Washington and its agencies had, under color of state law, deprived them of rights secured to them in their treaties and under the Constitution of the United States; and under 28 U.S.C. §1362, as to those plaintiff-intervenor tribes which had a governing body duly recognized by the Secretary of the Interior and which alleged violations of rights under the Constitution, laws and treaties of the United States.

2. The Course of the Proceedings Below.

This action is one facet of the continuing litigation in United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974) ("Final Decision I"), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); United States v. State of Washington, 459 F.Supp. 1020 (W.D.Wash. 1974-1978) ("Post-Trial Decisions"); various appeals dismissed, 573 F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), decisions at 459 F.Supp. 1020, 1097-1118 (W.D.Wash. 1977-1978), aff'd sub nom. Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington, 573 F.2d 1123 (9th Cir. 1978), aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

These initial decisions established the nature and extent of the rights to fish under the treaties.

Shortly after the initial decision in 1974 by the district court, several tribes [2/] including the petitioners, Duwamish, Samish, Snohomish, Steilacoom and Snoqualmie Indian Tribes (hereinafter referred to as "tribes" or "petitioner tribes"), intervened in United States v. Washington to have their treaty reserved rights to fish affirmed by that court.

Following evidentiary hearings before the magistrate and the court, the trial before the district court was held in

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2/ The Jamestown Clallam, Lower Elwha Clallam, Nooksack, Port Gamble Klallam, Suquamish, Swinomish, Aboriginal Swinomish, Tulalip Tribes, Inc. all intervened at the same time as the petitioning tribes herein. The Nisqually and Puyallup Tribes were allowed to intervene on their own behalf, formerly having been represented only by the United States. 459 F.Supp. at 1028. The Aboriginal Swinomish Tribe has not yet asked for hearing before this court. All other intervenors except the petitioners were supported by the United States and their treaty rights were affirmed.

October 1975. Due to post-trial briefing the case was not fully submitted to the court until April 1977. The court did not decide this issue until March 23, 1979 when the court signed without substantial change the order originally proposed and lodged by the United States in March of 1976. (CR 5726).[3/] In April, 1979 the petitioners moved for reconsideration which was denied the same day. (CR 5759, 5802).

The district court's order held that none of the five intervenor tribes was at that time "a political continuation of or political successor in interest to any of

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3/ Exhibit and Record numbers are those used in the court below. References to the clerk's records will be (CR). Exhibits will be as utilized in the courts below by reference to the party submitting it: United States (Ex-USA); Samish, (Ex-SA); Snohomish (Ex-SNH); Snoqualmie (Ex-SNQ); Steilacoom (Ex-SC); Duwamish (Ex-DU). References to the hearings before the court will be (RT) and to the final pretrial order will be (FPTO). References to the district court decision below will be to Findings of Fact (FF) or Conclusions of Law (CL).

of the tribes or bands of Indians with whom the United States treated..." United States v. Washington, supra, 476 F.Supp. at 1104, FF 12. After making general findings applicable to all tribes, the court made substantially identical specific findings concerning each of the five intervenor tribes one of which provided that:

> It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government for any individuals or territories. None of the organizational structure, governing documents, membership requirements nor membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs.

Id. (Duwamish Tribe) 476 F.Supp. at 1105, FF 16; (Samish Tribe) 476 F.Supp. at 1106, FF 25; (Snohomish) 476 F.Supp. at 1107, FF 35; (Snoqualmie) 476 F.Supp. at 1108, FF 45; (Steilacoom) 476 F.Supp. at 1109, FF 54.

The court then entered seven conclusions of law. 476 F.Supp. at 1110-1111. Conclusion of law three found that the question of which entities may exist as treaty tribes is a political question requiring "determination or concurrence by the political authorities of the United States". Id. at 1111.

The district court reemphasized the view that the exercise of treaty rights is dependent on post-treaty recognition in conclusions of law four and five. These conclusions expressly held that only tribes recognized administratively by the United States could possess treaty fishing rights. Id.

The second conclusion of law sets out six conditions for a tribe to prove that it has maintained a tribal organization for purposes of being a treaty tribe:

> ...the extent to which the group's members are persons of Indian ancestry who live and were brought up in an

> Indian society or community, to the extent of Indian governmental control over their lives and activities, the extent and nature of the members' participation in tribal affairs, the extent to which the group exercises political control over a specific territory, the historical continuity of the foregoing factors, and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the specific political relationship between the United States and Indian...

476 F.Supp. at 1110. These conditions are either requirements that expressly require federal recognition (see condition 6) or are attributes that only tribes which are federally recognized could meet.

A timely notice of appeal was filed in the Ninth Circuit on June 27, 1979. The tribes appealed from all of the findings of fact and conclusions of law made by the district court. The tribes asserted that the district court erred by relying on impermissible legal standards to reach its decision. Specifically

appellants challenged the holding that a tribe has to be administratively recognized by the federal government before it can exercise treaty fishing rights. The tribes also asserted that by removing formal federal recognition as a permissible criterion, the evidence presented supported a conclusion that they had maintained their tribal organizations.

In the Ninth Circuit's decision Judge Eugene A. Wright, writing for the majority, held that the district court had indeed erred in holding that administrative recognition by the U.S. Department of the Interior is a precondition to the exercise of treaty fishing rights. United States v. Washington, 641 F.2d 1368, 1371 (Appendix A-1). The court also held that the remaining criteria, other than federal recognition, used by the district court to determine the treaty status of the petitioners "may be relevant" but did "not

adequately define the controlling principles." 641 F.2d at 1372. The circuit court then substituted new criteria to determine whether a tribe holds treaty fishing rights. These criteria require maintenance of tribal structure and presence of some defining characteristic of the original tribe in an evolving tribal community. 641 F.2d at 1373. Neither the district court nor the tribes had an opportunity to address these new criteria developed by the court.

Despite the rejection by the appellate court of the standards used by the district court, the Court of Appeals nevertheless held that the lower court findings were not clearly erroneous.

Circuit Judge Canby dissented on the grounds that the findings of the district court did not resolve the "determinative question of tribal continuity." 641 F.2d at 1347. He stated that the findings of

the district court did not take into account the nature of tribal organization that existed at treaty times nor otherwise adequately satisfy the criteria the Ninth Circuit had just articulated. He stated that the district court's findings, upon which the majority had relied, reflected a requirement that federal recognition is a precondition to the exercise of treaty rights. This was so despite the fact that the Ninth Circuit had just held that federal recognition was not relevant to this issue. 641 F.2d at 1375.

3. Statement of Facts.

The United States entered into a series of treaties with Indian tribes in the Pacific Northwest in the 1850's. Under these treaties the Indian tribes of the then Washington Territory were induced to give up their land in exchange for small reservations. In addition they reserved the right of taking fish at all

usual and accustomed grounds and stations. See, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 661-662 (1979).

As mentioned above, the names of the petitioners are on the treaties of Medicine Creek and Point Elliott. (See Appendix C-1, C-14; FPTO at 3, CR 1552). And each of the petitioners is composed primarily of persons who are descended from members of the Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom Tribes that signed the above two treaties.

The Indian tribes in what became Western Washington had, for the most part, little or no formal tribal organization. Passenger Fishing Vessel Association, supra at 664; quoted with approval in United States v. Washington, supra, 641 F.2d at 1373, n.6. As this court recently noted the territorial officials who negotiaged the treaties on behalf of the

United States "took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." Passenger Fishing Vessel Association, supra, at 664, n.5 (citation omitted).

Dr. Barbara Lane, an anthropologist employed as an expert witness for the United States throughout United States v. Washington, testified at length at trial on the forms of tribal orgnization which existed in 1855. She noted that tribes in other parts of the country had relatively formalized political organizations with head chiefs and governing councils. By contrast the particular bands and tribes in the Pacific Northwest had no formal organization, village chiefs or village governing councils. (RT Oct. 23, 1975 at 33). Leadership tended to be task oriented with different specialists in charge depending on the occasion. Thus there

were different leaders for the tasks of hunting, fishing and religious ceremonies. Ex. USA-20 at 8. Participation in tribal government and other aspects of tribal society was voluntary. Villages cooperated on various tasks, but participation was not mandated by a chief governing body or other formalized form of government. (See RT Oct. 28, 1975 at 35).

Dr. Lane testified that the petitioners exercised governmental powers in the same way and to the same extent as each of the other tribes that are parties to United States v. Washington. (RT Oct. 28, 1975 at 39).

Throughout the Pacific Northwest, Indian society was organized by small village, rather than large "tribe". Winter villages were made up primarily of extended families living in a single location. (Ex. USA-20 at 7-8). At the other times of the year these winter villages dispersed for

fishing, clam digging and other activities.

The treaties contained provisions which required Indians to remove to land set aside as reservations but only a minority moved onto the reservations. (RT Oct. 28, 1975 at 61, 62, 66). The United States chose not to enforce removal of tribes to reservation lands. Therefore, many tribes, including the petitioners, remained off reservation. (FPTO Part 2 at 3, CR 1552).

In the 1930's a dichotomy began to develop between on and off reservation groups. The Bureau of Indian Affairs provided assistance to Indian groups and unorganized individuals living on reservations so as to organize new tribal structures under the Indian Reorganization Act (25 U.S.C. §461 et seq.). Since they lived on reservations held in trust for them, the United States recognized them as tribal governments.

Off reservation tribes did not receive assistance in the 1930's to reorganize. It was not until after the passage of the Indian Claims Commission Act, 25 U.S.C.§70 et seq. that the United States began providing similar organizational assistance to the petitioners. The primary witness for the United States, Paul Weston, an employee of the BIA, testified that the Bureau provided substantial services after the 1940's specifically directed to development of constitutions and other governing documents for the petitioner tribes. (Ex. USA-107 at 9-10). Thus today tribes both off and on reservation have governments that closely resemble political structures in non-Indian society. (RT Oct. 28, 1975 at 37).

The petitioners and their members have been provided other services by the BIA and have been recognized as tribes by others. Tribal members attended BIA

schools because of their status as Indians. (See e.g., Ex. SA-3 at 239; Ex. SNH-25 through 30).

In the years before United States v. Washington the Bureau of Indian Affairs issued official blue identification cards to petitioners' members identifying them as being Indians entitled to fish pursuant to the treaties, (see Ex. SA-31, -32, -33; Ex. SNH-46; Ex. SNQ-6; Ex. SC-11). The BIA provided these cards to members of the petitioner tribes on the same basis as it provided them to other tribes currently parties to this case. With approval of the United States the petitioners continued to exercise treaty fishing rights to the same extent as other Western Washington tribes until intervening in United States v. Washington.

All of the petitioners are members of inter-tribal organizations and are recognized as tribes by others. (See e.g., Ex.

SA-3, -34; Ex. SNH-3, -32, -33).

One of the tribes, the Snoqualmie, can point to concerted efforts by the BIA to establish a separate reservation for it. See Ex. SNQ-13 at 41-47; Ex. USA-104 at 21.

At the time of the district court's decision and as of this date, none of the five tribes have been administratively recognized by the Department of the Interior as Indian tribes eligible for programs administered by the Bureau of Indian Affairs.[4/] See Indian Tribal Entities That Have A Government-to-Government Relationship With The United States, 46 Fed.Reg. 35360 (July 8, 1981). All of the five tribes, however, have had petitions for acknowledgment of their

4/ It is not clear when the United States ceased to recognize these tribes given the history above of provisions of services and support for their treaty rights. The administrative decision to not recognize these tribes has forced them to apply for recognition through the new acknowledgment regulations. 25 CFR Part 54.

status as Indian tribes pending before the Department of the Interior for up to five and six years in some cases. Receipt of Petition for Federal Acknowledgment of Existence as Indian Tribes, 44 Fed.Reg. 116 (December 26, 1978). Under the new regulations published by the BIA two of the tribes, the Samish and Snohomish, have had their petitions declared to be under active consideration by the BIA. A preliminary decision on their status as recognized tribes is pending and due at the beginning of 1982.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of This Court And Other Circuit Courts Which Require Remand Where An Erroneous Legal Standard Provided The Basis For Resolving Disputed Factual Issues.

The court of appeals affirmed key findings of the district court that the

petitioners have lost their treaty fishing rights despite the fact that their ancestors signed the treaties of Point Elliott and Medicine Creek. It made this ruling although it had just held that the legal conclusions upon which those findings were based were incorrect.

Review should be granted here because the Ninth Circuit's ruling is in conflict with this Court's decisions that require a case to be remanded when the district court applies the wrong legal standard to disputed facts. This case presents a vehicle by which the Court can clarify the respective duties in this situation of the district and appellate courts - duties that are often only outlined implicitly in the cases. The circuit court's decision also demonstrates the need to settle the application of the clearly erroneous test under Fed.R.Civ.P. 52(a) to a case involving disputed issues of fact and incorrect

conclusions of law.

Unless review is provided the decision of the court of appeals to abrogate the treaty rights of the tribes will stand. The Ninth Circuit decision effectively denies the petitioners their right to a fair hearing based upon the proper legal criteria.

a. Review of the Ninth Circuit's opinion presents an opportunity to clarify previous decisions of this Court on the proper role of the court of appeals in reviewing disputed factual findings that have been tainted by incorrect legal conclusions.

This Court has held that when there is a disputed issue of fact the parties should have an opportunity to present new evidence to the district court when a new legal theory or a new criterion of law has been decided by the appellate court. DeMarco v. United States, 415 U.S. 449

(1974) (per curiam); Dandridge v. Williams, 397 U.S. 471, 476, n.6 (1970); Helvering v. Gowran, 302 U.S. 238, 247 (1937); Forged Steel Wheel Company v. Lewellyn, 251 U.S. 511, 515-516 (1920). In the instant case there is no doubt that the district court applied the wrong law, that there are seriously disputed issues of fact, and that the circuit court articulated a new legal standard to be used in deciding the factual question. Thus the appellate court should have remanded the case for factual findings consistent with its opinion. See e.g., Jimenez v. Weinberger, 417 U.S. 628, 637-638 (1974); Alderman v. United States, 394 U.S. 165 (1969); Kolod v. United States, 390 U.S. 136 (1968) (per curiam). The circuit court ruling is in conflict with these cases. 5/

5/ The Ninth Circuit decision is also inconsis-
(footnote continued on next page).

The circuit court's failure to follow the rule articulated by this Court may be explained by the fact that the sound policy reasons behind the rule have not been fully examined in any case reviewing a trial court's decision. This Court's clearest statement of these policy reasons is in a case reviewing an administrative decision. See, Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943). Justice Frankfurter while re-stating the familiar rule of Helvering v. Gowran, supra, that if a lower court decision is correct it must be affirmed even if based upon a wrong ground or wrong reason, Chenery Corp., supra at 88, cautioned that:

> The reason for this rule is obvious. It would be wasteful to send a case back to a lower

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tent with rulings in other circuits. Heirs of Fruge v. Blood Services, 506 F.2d 841, 844 (5th Cir. 1975); see, Arlinghaus v. Ritenour, 622 F.2d 629, 638 (2d Cir. 1980) cert. denied, ___ U.S. ___, 101 S.Ct. 570 (1980).

> court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.

Chenery, supra at 88 (emphasis added).

This case presents the opportunity to examine the issue in Chenery, and only implicit in the above cases, in the context of a review of a district court decision.

The court of appeals' decision below preempted the role of the district court contrary to Chenery. The court of appeals held that the district court had misapprehended the correct legal criteria by focusing almost entirely upon lack of recognition.[6/] United States v. Washington,

6/ Lack of recognition of a tribe as such by the (footnote continued on next page).

641 F.2d 1368, 1371 (9th Cir. 1981). The appellate court then outlined the correct criteria that the district court should have applied, but failed to remand so that the new criteria could be applied. Instead it affirmed the trial court's decision based upon an acceptance of findings that not only failed to address the new criteria, but were also clearly tainted by the misapplication of the wrong legal standard.

Petitioners were thus denied a fair opportunity to have the district court

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Executive Branch of the government has never been allowed to affect vested treaty rights affirmed by Congress. United States v. Washington, supra, 520 F.2d at 676; F.Cohen, Handbook of Federal Indian Law at 268 (1942). Rather, "recognition" of groups of Indians as tribes has been an administrative process by which the Department of the Interior has determined who gets specially earmarked statutory services such as Indian health care (25 U.S.C. §1601 et seq.) and care for minor Indian children (25 U.S.C. §1901 et seq.) This administrative process was recently formalized in 1978 through the enactment of new regulations to determine whether Indian groups exist as tribes. 25 CFR Part 54. Before these regulations recognition was decided on an ad hoc tribe-by-tribe basis.

consider their case free from its "erroneous misapprehension" of the relevance of federal recognition. Compare, New York State Department of Social Services v. Dublino, 413 U.S. 405, 422 (1973) and Dandridge, supra. Although the district court mentioned other criteria, they all relied on the misguided notion involving recognition and diverted the district court's attention from the real issues. See e.g., United States v. Washington, supra 641 F.2d at 1375 (Canby, dissenting).

A remand of this case will provide the petitioners with an opportunity to respond to the correct legal standards for determining treaty status that were articulated for the first time by the court below. 641 F.2d at 1372-1373. Remanding could have given the parties a chance to develop or explain the trial court record in light of the new appellate decision. Jimenez, supra; Helvering v. Gowran, supra.

The district court never made findings on the correct issues defined by the Ninth Circuit - whether some "defining characteristic of the original tribe persists in an evolving tribal community." Neither were findings made on whether assimilation is so complete that the tribe cannot claim treaty rights.

The court of appeals' decision short-circuited the district court's duty to make the initial findings of fact based on the correct criteria. The court of appeals in effect tried to take the place of a jury, a role that Chenery warned against. Judicial economy is better served by the appellate courts limiting their role to a review of the correctness of the law.

This limitation of the appellate function is all the more crucial in a time when the number and complexity of appellate cases is increasing rapidly.

See e.g., Federal Appellate Justice in 1973: a Symposium, 59 Cornell L.Rev. 571, 657 (Apr. 1974). One way to limit the burden on the appellate courts is to reaffirm that courts of appeals should not decide factual issues which have not been "resolved in the first instance ... by the District Court." DeMarco v. United States, supra, at 450, fn. The duty to make findings of fact rests first on the district court whether it is on an issue raised first on appeal, as in DeMarco, or whether it is with a factual question after the court of appeals has redefined the applicable legal standards as in Jiminez or Dublino.

The need for a careful review is especially compelling when the issue is the complicated question of whether a tribe possesses treaty fishing rights. That the question of tribal status is complex can be seen by examining other

analogous cases where similar issues arose. Thus the district court of Massachusetts recently had a forty day trial on the issue of whether the Mashpee Tribe was a "tribe of Indians" within the meaning of the Indian Nonintercourse Act, 25 U.S.C. §177. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) cert. denied, 444 U.S. 866 (1979).[7/]

The equally complex history of the petitioners which was put before the district court also deserves a fair hearing unencumbered by improper legal standards. This Court should grant review to more clearly define the proper role of the

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7/ The First Circuit also affirmed that the determination of tribal status could proceed without regard to the Department of the Interior's then developing administrative process for recognizing tribes. Id. 592 F.2d at 580-581. The petitioning tribes herein should, like the Mashpee Tribe, have the opportunity to present their case at a trial free from the misperception that federal administrative recognition is the sine qua non to the exercise of treaty rights. The tribes will only have that opportunity if this Court grants certiorari.

court of appeals.

b. The standard of review adopted by the court of appeals is inconsistent with previous decisions of this court which apply to Fed.R.Civ.P. 52(a).

Virtually every factual finding by the district court was rendered under what the court of appeals found to be an incorrect legal standard. The appellate court, however, did not focus upon the tainted relationship between the district court's findings and its application of an erroneous legal standard. Rather, it limited its review to the sufficiency (rather than untainted quality) of the district court's key findings.

Acting on the supposition that it was free to apply the "clearly erroneous" standard of Fed.R.Civ.P. 52(a) as long as the legal error did not leave the court with an "inadequate factual record on which to affirm", (Id. 641 F.2d at 1371),

the majority went on to hold:

> We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous.

United States v. Washington, supra, 641 F.2d at 1374.

The circuit court's avoidance of the taint issue by focusing instead upon the adequacy of the "factual record on which to affirm" is contrary to the policies implicitly set forth by this court in applying the principles of Fed.R.Civ.P. 52(a),

The Court has already provided the controlling standard for reviewing the sufficiency of findings under Fed.R.Civ.P. 52(a). See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). And this Court has likewise spoken regarding the proper scope of review for findings made under an erroneous view of the law. See Dayton Board of Education v. Brinkman 433 U.S. 407, 417-418 (1977) where the

Court held that when the district court has misapprehended the law, the appellate court "may accept the court's findings of fact but reverse its judgment because of legal errors." Id. at 418.

In applying the principle enunciated in Dayton School Board, however, this Court has limited itself to cases where the findings neither reflected a balancing of facts nor the resolution of a disputed record. The tribes' case is unlike Dayton School Board where the Court could substitute the correct legal standard and resolve the issue as a matter of law. See also, United States v. The Singer Manufacturing Co., 374 U.S. 174 (1963). It is also unlike Gypsum where the legal standards are correct. It is, rather, a combination of these two issues. The factual record has been tainted by the erroneous legal standard. As a result, the case cannot be resolved as a matter of

law.

If balancing or weighing of facts or the resolution of disputed facts is involved, as in the present case, the task is no longer that of resolving legal issues. It becomes the province of a fact finder (i.e., district court), not that of the appellate tribunal which does not determine facts de novo. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

This problem is not totally new to this court. In Kelley v. Southern Pacific Co., 419 U.S. 318 (1974), the district court had ruled in favor of the petitioner by applying what this Court held to be a legally erroneous standard for defining "while employed" under the FELA. Kelley v. Southern Pacific Co., supra, 419 U.S. at 325-326. This Court further found that the "facts found by the District Court" did not support the original plaintiff's posi-

tion when considered against the proper legal standard, Id., 326. Nevertheless, this Court took issue with the appellate court's decision to find for the respondent, and instead remanded to the district court:

> Similarly, while the Court of Appeals may have meant to suggest that in its view the record could not support a finding of employment, that suggestion is not developed in its opinion, and we think the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard. Accordingly, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand the case to the District Court for further findings in accordance with this opinion. Id. at 332.

By contrast, in the present case the appellate court does not begin to suggest that the record could not support a finding that the petitioners are treaty tribes. It merely holds that the contrary findings of the district court is not "clearly erroneous". United States v.

Washington, supra, 641 F.2d at 1372.

Implicit in the Kelley decision was a recognition of the possibility that the erroneous legal standard had skewed the fact finding and evaluating process. Fairness demanded the opportunity for developing findings which could comport with the proper standard. Application of Kelley to petitioners' case is warranted. Nevertheless, the Kelley case falls far short of articulating a clear standard of review and remand for cases such as the present one.

The circuit courts are virtually unanimous that "the clearly erroneous rule does not apply to findings made under an erroneous view of controlling legal principles" (citation omitted). Triangle Publications v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980).[8/]

8/ See also, e.g., Harrison v. Indiana Auto Shredders Co., 528 F.2d, 1107, 1120 (7th Cir.
(footnote continued on next page)

As an alternative statement of this position, some courts have defined findings induced by an erroneous application of the law as "clearly erroneous." See e.g., Case v. Morrisette, 475 F.2d 1300, 1307, n.36 (D.C.Cir. 1973).

Distinctions between cases that may be decided as a matter of law and those in which remand is required in order to cure a record tainted by application of an erroneous legal standard, however, are implicit rather than explicit in individual opinions. E.g., compare, Grant v. Smith, 574 F.2d, 252, 255 (5th Cir. 1978) (remand for further consideration and findings when district court incorrectly "expressed

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1976); Rowe v. General Motors Corp., 457 F.2d 348 356, n.15; (5th Cir. 1972); Lewis v. Super Valu Stores, Inc., 364 F.2d 555, 556 (8th Cir. 1966); cf. Senter v. General Motors Corp., 532 F.2d 511, 526, (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976); Owen v. Commercial Union Fire Ins.Co. of New York, 211 F.2d 488, 489 (4th Cir. 1954); 9 Wright & Miller, Federal Practice and Procedure, at 734 ("Insofar as a finding is derived from the application of an improper legal standard to the facts, it cannot stand").

emphasis on plaintiffs' lack of good faith" in Fair Housing Act case); Le Banc v. Two R. Drilling Co., 527 F.2d 1316, 1319-1320 (5th Cir. 1976) (remand with instructions for specific findings when district court had applied wrong standard assessing liability between shipowner and contractor for services), with, Triangle Publications v. Knight-Ridder Newspapers, supra, 626 F.2d 1171 (case decided as a matter of law applying proper standard to undisputed facts).

The need to articulate a standard of review for cases involving application of incorrect law to disputed facts and the effect such erroneous law may have had on the fact-finding process, moreover, has become heightened by the fact that the seriously misguided analysis applied to the issue by the circuit court now stands as authority on this issue. The majority approached the taint problem by asserting

a standard of review which limited remand to those cases where the appellate court had an "inadequate factual record on which to affirm". supra at 1371. For this standard, the court looked to Amador Beltran v. United States, 302 F.2d, 48 (1st Cir. 1962) a criminal sufficiency of evidence case which rested its own consideration of remand upon a notion of double jeopardy since rejected by this Court.

With all the recent civil cases available which specifically deal with the effect of a legal error upon Rule 52(a), it is peculiar that the court chose to rely upon Amador Beltran which never cites Rule 52(a) to support its pivotal legal premise. Amador Beltran involved a trial court's rejection of an insanity defense based upon reasons which the appellate court found unjustified by the record. Aside from the lack of sufficient evidence

to deny the defense, the only matter approaching legal error was the trial court's apparent lack of appreciation of the gravity of the government's burden of proof. Amador Beltran, supra, 302 F.2d at 52. Unlike the present case, Amador Beltran involved no tainted findings or skewed record. Translated to a civil context it might rather be seen as parallel to cases where remand has been ordered for a fuller factual record. See e.g., Hathley v. United States, 351 U.S. 173, 182 (1955) (remand to determine value of individual ponies and burros); In re FTC Line of Business Report Litigation, 626 F.2d 1022, 1028 (D.C. Cir. 1980) (remand for articulation of basis for reimbursement and fees.

The fallacy of transposing the Amador Beltran approach to the present context is apparent. Focusing solely upon the "adequacy" of a record which has been

skewed by legal error serves only to shelter the infection of that error. It is a standard which defines the problem away rather than confronting the nexus between the development of the factual record and findings and the erroneous legal standard. In the place of this erroneous standard of review, petitioners ask this Court to take Kelley beyond an instance of ad hoc decision-making, and provide a standard whereby remand is required whenever there is a reasonable possibility that the error touched and skewed the factual record with its taint, cf, Kelley v. Southern Pacific. Co., supra 419 U.S. 318.

2. The Court of Appeals' Decision Conflicts With This Court's Decision In Menominee Tribe v. United States, By Making Satisfaction Of Its Legal Criteria For Treaty Status Impossible Without Federal Recognition. It Also

Conflicts With Decisions Of The First Circuit.

The circuit court's decision conflicts with this Court's in Menominee Tribe v. United States, 391 U.S. 404 (1968) which held that treaty fishing rights cannot be lost except through affirmative act of Congress. Menominee, supra at 412-413. Menominee also supported the proposition that the absence of federal recognition cannot serve to terminate treaty fishing rights.

Because of this holding the circuit court first disavowed the relevance of recognition. 641 F.2d at 1371. But after restating this rule the court effectively ignored it later by articulating criteria that can only be satisfied by a tribe that is federally recognized. Thus while giving lip service to this Court's decision in Menominee the circuit court applied the very standard which it (and this Court) had

declared inapplicable.

That the circuit court turned the Menominee rule on its ear is evident from examining several key provisions of the decision below. First the circuit court found that the treaty rights of the tribes were lost because the tribes have "not controlled the lives of [their] members". 641 F.2d at 1373.[9/] What the circuit court failed to recognize is that off-reservation tribal governments such as petitioners have considerably less authority over their members than do on-reservation tribal this governments. Indeed this Court held in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state

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9/ In the same passage the circuit court noted that each of the petitioners now operate pursuant to constitutions and formal government structures.

law otherwise applicable to all citizens of the State." (citations omitted). 411 U.S. at 148-149. Without recognition the peitioner tribes cannot have a reservation and the concomitant power over their members recognized within that territory. Thus, when the circuit court relied upon control over the tribal members as a key criterion in denying the petitioners' treaty rights, it in effect relied upon the failure of the United States to recognize those tribes and provide them with a territority within which they could have greater power over their members.

That petitioners cannot exercise power to the extent of on-reservation recognized tribes is not to say they exercise no control over their members. Indeed in those situations where there is "express federal law" they act to the fullest extent of that law. See Mescalero, supra. From the time before the Stevens treaties and continuing

up to the filing of United States v. Washington, each of the petitioner tribes managed the off-reservation fishing of its members although this control was limited by the continued resistance of the State of Washington. However, to the extent any tribe controlled its fishing, appellants also controlled their fishing rights as well. See, e.g., Passenger Fishing Vessel Association, supra; Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).[10/] Unfortunately, the circuit court neglected to examine the relevant scope of tribal authority exercised by any tribe off-reservation when it made its observation that the petitioners exercised little authority over their members.

Similarly, the circuit court was

10/ See also Indian Claims Commission Act, 25 U.S.C. §70 et seq. Petitioners were fully responsible for administering claims cases filed against the United States. In this regard they received considerable assistance from the United States. Ex. USA-107 at 9.

preoccupied with the fact that appellant tribes had not settled in distinctively Indian residential areas. See 641 F.2d 1373-1374. Once again the court of appeals equated the existence of a reservation - a distinctively Indian residential area - with the existence of treaty fishing rights.

It cannot reasonably be assumed that off-reservation Indian tribes can maintain distinct Indian communities similar to those on a reservation. The greater number of non-Indian citizens makes this impossible. Indeed as this Court has noted, many reservations have themselves been virtually consumed by non-Indian residents. See Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165, 174 (1977) (Puyallup III). Yet the tribes on these reservations are able to exercise treaty fishing rights.

If the lower courts had examined

the actual circumstances of the petitioners rather then considering only recognition, they would have seen that the overwhelming percentage of the petitioners' members continue to occupy their aboriginal territory. The upshot of the circuit court's logic is that reaffirmation of vested treaty rights by federal administrative recognition must take place before those rights can be exercised. This is contrary to the rule declared in Menominee which holds that treaty rights remain unaffected except where Congress acts affirmatively to terminate those rights.

The logic and justice of the Menominee rule is strikingly evident by examining this case. The Menominee rule was designed to insure that vested treaty rights could not be lost through acts of inadvertence or neglect on the part of the United States. Compare, United States v. Washington, supra, 641 F.2d at 1373.

Congress and the executive must act with conscious purpose if they are to terminate vested treaty rights. The rule is consistent with the way this Court has always viewed the relationship between Indian tribes and United States. This special relationship demands careful consideration when the United States is acting to remove rights which have been granted or reserved in treaties. cf. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Sioux Nation of Indians, ___ U.S. ___, 100 S.Ct. 2716 (1980).

The court of appeal's holding that allows lack of recognition to be used indirectly to the detriment of the tribes conflicts not only with Menominee but also with decisions of the First Circuit. See Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). The First

Circuit in these cases found that a tribe not recognized by the federal government may still possess sovereign immunity (Bottomly at 1064) and may be a tribe for purposes of the Indian Nonintercourse Act 25 U.S.C. §177 (Joint Tribal Council, supra). The First Circuit, unlike the Ninth, is unwilling to penalize Indian tribes for not being recognized.

In the instant case petitioner tribes find that they have lost treaty rights solely because the United States has failed to bestow formal recognition. Neither the district court nor any of the parties below even identified any act of Congress that purports to abrogate the treaty rights of the petitioners. The United States theory which allows abrogation of treaty rights through inaction is inconsistent with Menominee. This Court should grant review to correct the lower court decision.

3. The Court of Appeals Decision Is Inconsistent With This Court's Decision In United States v. John By Articulating The Incorrect Standard For Tribal Assimilation

Review should also be granted because of the conflict between this Court's decision in United States v. John, 437 U.S. 634 (1978) and the Ninth Circuit decision. This Court's decision in United States v. John raises but does not fully settle the question of when a tribe becomes so assimilated that it ceases to exist. This Court can help clarify these important questions.

The court of appeals held that when assimilation of a tribal group is complete the tribe can no longer hold treaty rights. United States v. Washington, 641 F.2d at 1373. It does not appear that the Court fully applied this standard to the tribes by instead substituting recognition -

dependent criteria. See Part 2, supra. To the extent that assimilation was fully considered, however, the court concluded that it has occurred if tribal members do not live in "distinctively Indian residential areas." Id., 641 F.2d at 1373-1374. The court so held despite its admission that all the petitioners now have "constitutions and formal governments" (641 F.2d at 1373) and have received assistance in the past from the United States in maintaining these governments. See, Statement of Facts, supra at 20-22. The standard for assimilation implied in the circuit court's ruling is different then that used by this Court in United States v. John and in other cases.

Complete tribal assimilation and voluntary termination can and does occur. See, The Kansas Indians, 72 U.S. (5 Wall) 737, 757 (1867). And when a tribe disappears the federal government's power to

deal with the individual Indians as a racial class may also be limited. United States v. Antelope, 430 U.S. 641 (1977); United States v. Mazurie, 419 U.S. 544 (1975); compare, Regents of the University of California v. Bakke, 438 U.S. 265, 304 n.42 (1978).

United States v. John, however, indicates that such an event has not occurred merely because an Indian tribe does not live in an distinct Indian community. Id. 437 U.S. at 643-647, n.12. An Indian tribe continues to exist even when it is considered "merely a remnant of a larger group of Indians..." Id. 437 U.S. at 653.

In John the members of the Choctaw tribes continued to live in their aboriginal area and be identified by themselves and others as members of the tribe. Id. There is no evidence that the petitioners in the instant case were any more assimilated then the Mississippi Choctaws.

John indicates that the petitioners have not been assimilated despite the holding of the Ninth Circuit to the contrary. This case presents the chance for the Court to correct the error below and to define the standards implicit in United States v. John.

CONCLUSION

The petitioner tribes have not been afforded a fair opportunity have their evidence considered by the courts below. The result of this denial of a fair hearing has been the judicial abrogation of the petitioners' vested treaty rights to fish. The appellate court applied an improper legal standard to disputed facts. Once the appellate court had determined that the wrong legal standard had been applied to the facts below, it was incumbent upon that court to remand the case to the district court for application of the correct legal standard to the disputed

facts. The failure of the appellate court to follow this procedure is in violation of decisions of this Court. This case presents the opportunity for this Court to clarify the proper role of the court of appeals when faced with this problem.

The court of appeals continued to require the petitioners to show they were federally recognized as a prerequisite to the exercise of treaty fishing rights even as it denied the applicability of that legal criterion. The appellate court's action violated this Court's decision in Menominee which holds that lack of federal recognition or recognition-dependent tribal characteristics cannot serve to abrogate those rights.

The petitioners do not seek to expand or enlarge the treaty right of taking fish. Nor do they seek to invade or diminish the rights retained by non-Indian fishermen. Petitioners only seek to have the

appropriate law applied to their facts prior to a judicial determination that their vested treaty rights have been lost Petitioners seek to have the clear rulings of this Court applied to their situation.

DATED this 11th day of September, 1981.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

SAMISH, SNOHOMISH, SNOQUALMIE and
STEILACOOM INDIAN TRIBES
Plaintiffs-Intervenors/Appellants,

and

DUWAMISH INDIAN TRIBE,
Plaintiff-Intervenor/Appellant,

v.

STATE OF WASHINGTON, et al.,
Defendants.

Nos. 79-4447, 79-4472

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 11, 1980.

Decided April 20, 1981.

Vacated and corrected by court order
on June 8, 1981.

Before WRIGHT and CANBY, Circuit Judges, and PATEL, District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

*Of the Northern District of California.

In the 1850's several Indian tribes were induced to relinquish much of their aboriginal land so that white people could settle in Washington Territory. The tribes received certain payments and were allowed to keep small parcels of land on which to live. In addition, because fishing was the source of their livelihood, they reserved the right of taking fish at all usual and accustomed grounds in common with citizens of the Territory. 1/

More than a century later, when fish

1/ Language to this effect is found in several treaties negotiated by Isaac Stevens, Territorial Governor, on behalf of the United States. The Steilacoom Tribe was a party to the Treaty of Medicine Creek, 10 Stat. 1132 (signed December 26, 1854; ratified March 3, 1855; proclaimed April 10, 1855). The Duwamish, Samish, Snohomish, and Snoqualmie Tribes were parties to the Treaty of Point Elliott, 12 Stat. 927 (signed January 22, 1855; ratified March 8, 1859; proclaimed April 11, 1859).

For a more extensive discussion of the Stevens treaties and the general context of this litigation, see Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 661-74, 99 S.Ct. 3055, 3063-69, 61 L.Ed. 823 (1979).

had grown scarce, the Indians who remained took only a small percentage of the fish harvest in Washington State.[2] Judge Boldt then held that the treaty tribes were entitled to take up to fifty percent of the harvestable fish on runs passing through their traditional off-reservation fishing grounds. United States v. Washington, 384 F.Supp. 312, 343 (W.D.Wash. 1974), aff'd, 520 F.2d 676, 682 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). The Boldt decision was substantially upheld by the Supreme Court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685, 99 S.Ct. 3055, 3074, 61 L.Ed.2d 823 (1979).[3]

2/ Between 1970 and 1973, Indians took only five percent of the total catch in Washington State. "Fishing Treaty Facts and Figures," Northwest Indian Fisheries Commission Annual Report 1980, p.12.

3/ See generally Case Note, Fishing Vessel Asso-
(footnote continued on next page)

After Judge Boldt's initial decision, several groups of Indians, including the appellants, intervened to assert treaty fishing rights. United States v. Washington, 476 F.Supp. 1101 (W.D.Wash. 1979). The parties agree that the appellants' members are descendants of treaty-signatory tribes. But the appellants' ancestors did not go to reservations, because the reservations were inadequate. Id. at 1102. The appellants now live among non-Indians and are not federally recognized.

Emphasizing nonrecognition, the lack of a geographic base, and the absence of formal tribal control over members, the United States and other appellees assert that the appellants are not the tribes that signed the treaties but are merely social clubs or businesses and are not entitled to exercise treaty fishing rights.

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ciation: Resolution of Indian Fishing Rights under Northwest Treaties, 16 Williamette L.Rev. 931 (1980).

The district court agreed with the United States, id. at 1104, and adopted, without substantial change, its proposed findings and conclusions.[4/] The appellants contend that the court applied an incorrect legal standard, made findings of fact that were clearly erroneous, and was bound by other judgments and the law of the case to decide differently. We affirm.

I.

[1] Verbatim adoption of proposed findings of fact by the district court is ordinarily disfavored and calls for close scrutiny by an appellate court. Hagan v. Andrus, ___ F.2d ___ at ___, No. 79-4424 (9th Cir., February 5, 1981); Photo

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4/ In 1974 Judge Boldt referred to a magistrate the question whether the appellants were the political successors-in-interest of treaty signatories. After a three-day hearing, the magistrate concluded that they were not.

Rather than immediately adopting the magistrate's conclusions, Judge Boldt tried the matter. It was submitted in 1977 but not decided until 1979.

Electronics Corp. v. England, 581 F.2d 772, 777 (9th Cir. 1978). But the district court's findings still must be upheld unless clearly erroneous. Fed.R.Civ.P. 52(a); Hagans v. Andrus, ___ F.2d at ___.

[2] We may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and we may affirm a correct decision on any basis supported by the record. United States v. Humboldt County, 628 F.2d 549, 551 (9th Cir. 1980). We must remand, however, if the district court's application of an incorrect legal standard leaves us with an inadequate factual record on which to affirm. See Amador Beltran v. United States, 302 F.2d 48, 52 (1st Cir. 1962).

II.

Reviewing Judge Boldt's initial decision, we indicated that treaty-tribe status is established when "a group of

citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." 520 F.2d at 693. Whether these conditions are met "is a factual question which a district court is competent to determine." Id. The appellants contend that the district court applied the wrong standard in determining that tribal structure had not been maintained.

A. Federal Nonrecognition

We stated that "[n]onrecognition of the tribe by the federal government ... may result in loss of statutory benefits, but can have no impact on vested treaty rights." Id. Judge Boldt subsequently stated, in resolving the present dispute: "Only tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." 476

F.Supp. at 1111.

[3,4] This conclusion is clearly contrary to our prior holding and is foreclosed by well-settled precedent. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412-13, 88 S.Ct. 1705, 1710-11, 20 L.Ed.2d 697 (1968); Kimball v. Callahan, 493 F.2d 564, 568 (9th Cir.), cert. denied, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974). The Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so. See Menominee Tribe v. United States, 391 U.S. at 412-13, 88 S.Ct. at 1710-11.[5/]

5/ In Menominee, an act of Congress expressly terminated all federal supervision and protection of the tribe. Members of the terminated tribe sought compensation for abrogation of treaty hunting and fishing rights. The Supreme Court held that the treaty had not been abrogated. 391 U.S. at 412, 88 S.Ct. at 1710. Despite congres-
(footnote continued on next page)

B. Other Considerations

Although the district court erred in stating that federal recognition is required to establish and exercise treaty rights, it identified other considerations as well. The appellees contend that these considerations support the court's decision.

The court observed that treaty rights are communal in nature and listed six considerations in determining whether a group of Indians forms the requisite communal unit:

> [1] the extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community,

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sional termination of all formal tribal political authority, treaty rights survived. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L.Rev. 17, 61 (1979). It follows, a fortiori, that administrative nonrecognition cannot destroy vested treaty rights.

[2] the extent of Indian governmental control over their lives and activities,

[3] the extent and nature of the members' participation in tribal affairs,

[4] the extent to which the group exercises political control over a specific territory,

[5] the historical continuity of the foregoing factors, and

[6] the extent of express acknowledgement of such political status by ... federal authorities ...

United States v. Washington, 476 F.Supp. at 1110.

The appellants point out that almost all of these factors involve, at least to some extent, federal recognition or residence on a reservation. The United States gave their ancestors inadequate reservations in the 19th century, and the policy of the United States through the early part of the 20th century was to discourage Indians from living in separate communities. Id. at 1103. They argue that these actions by the United States

should not be allowed to divest them of their treaty rights.

The district court's statement that federal nonrecognition is decisive, together with its listing of other purported considerations, makes it difficult for us to determine the precise basis for the court's holding that the tribes may not exercise treaty rights. Moreover, although some of the other considerations mentioned by the district court may be relevant, they do not adequately define the controlling principles. We must examine the record in light of these principles to determine whether the district court reached the correct result.

C. The Proper Inquiry

[5] The appellants' members do not seek compensation as individuals for violations of their ancestors' rights. Cf. Menominee Tribe v. United States, 391 U.S. at 407, 88 S.Ct. at 1708 (compensation

sought for abrogation of treaty). The appellants seek to exercise treaty rights as tribes. They may do so only if they are the tribes that signed the treaties.

[6] We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized structure. United States v. Washington, 520 F.2d at 693.

This single condition reflects our determination that the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty. For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.

[7] The tribe need not have acquired organizational characteristics it did not

possess when the treaties were signed. The white negotiators imputed to many of the treaty tribes a tribal structure they did not have.[6/] A structure that never existed cannot be "maintained."

Furthermore, changes in tribal policy and organization attributable to adapta-

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6/ "[S]ome bands of Indians [that signed the Stevens treaties] ... had little or no tribal organization." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664, 99 S.Ct. 3055, 3064, 61 L.Ed.2d 823 (1979) (footnote omitted). "Indeed, the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." Id. at 664 n.5, 99 S.Ct. at 3064 n. 5 (citation omitted).

One writer maintains: "Tribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities." G.Taylor, The New Deal and American Indian Tribalism 2 (1980).

See also Elser v. Gill Net Number One, 246 Cal.App.2d 30, 38, 54 Cal.Rptr. 568, 575 (1966) ("tribe," applied to California Indians, must "'be understood as synonymous with "ethnic group" rather than as denoting political unity'" because tribes in the political sense did not exist in California when Indian fishing rights statute was adopted).

tion do not destroy tribal status. Over a century, change in any community is essential if the community is to survive. Indian tribes in modern America have had to adjust to life under the influence of a dominant non-Indian culture. Note, The Unilaterial Termination of Tribal Status, 31 Maine L.Rev. 153, 164 n.55 (1979).

Federal policy has sometimes favored tribal autonomy and sometimes sought to destroy it. See United States v. Washington, 476 F.Supp. at 1103; G. Taylor, The New Deal and American Indian Tribalism 1-16 (1980). A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of the distinct Indian communities. See Note, 31 Maine L.Rev. at 164 n.55. 7/

7/ "[I]f a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe and its guardian, Congress, on its behalf." Mashpee Tribe v.
(footnote continued on next page)

[8] When assimiliation is complete, those of the group purporting to be the tribe cannot claim tribal rights. While it might be said that the result is unjust if the tribe has suffered from federal or state discrimination, it is required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities. See, e.g., United States v. Antelope, 430 U.S. 641, 646, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977); United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

[9] The appellants point to their management of interim fisheries, pursuit of individual members' treaty claims and social activities as evidence of tribal organization. But the district court specifically found that the appellants

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New Seabury Corp., 592 F.2d 575, 586 (1st Cir.) (citations omitted), cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).

had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." 476 F.Supp. at 1105, 1106, 1107, 1109, 1110.

After close scrutiny, we conclude that the evidence supports this finding of fact. Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.

The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood. That may be true of some members of tribes whose treaty status has been established. But unlike those persons, those who comprise the groups of appellants have not settled in distinctive-

ly Indian residential areas.

We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous.

III.

We have considered the appellants' other contentions and conclude that they lack merit.

A. Burden of Proof

[10] The appellants had the burden of proving that they were entitled to exercise tribal treaty rights. We reject their argument that, because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence.

They maintain that, just as conspiracy and parental relationships once proved are presumed to continue, so is tribal existence. The problem with such analogies is that the appellants have not proved that they are the tribes that

existed at treaty times so as to benefit from any presumption of continuing existence.

B. Other Judgments

[11] The appellants contend that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members. Snoqualmie Tribe v. United States, 372 F.2d 951, 957-58 (Ct.Cl.1967); Samish Tribe v. United States, 6 Ind.Cl. Comm. 159 (1958).

These claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable. 1B Moore's Federal Practice ¶0.405[1], [3].

C. The Law of the Case

[12] The appellants also contend that the court was bound by the law of the case to recognize their treaty status. They point out that the Stillaguamish and Upper Skagit Tribes were deemed to have fishing rights even though their membership rolls had not been federally approved and they do not live on reservations. See United States v. Washington, 384 F.Supp. at 327, 378-79. The law of the case, however, is that maintenance of tribal structure is a factual question, and we have concluded that the district court correctly resolved this question despite its failure to apply the proper standard. 8/

AFFIRMED.

8/ Because the district court's ultimate conclusion was correct, the denial of relief cannot be considered "arbitrary and capricious," as the Duwamish Tribe contends. The propriety of the relief granted to the Stillaguamish and Upper Skagit Tribes is not at issue in this appeal.

CANBY, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion quite correctly rejects the conclusion of law that federal recognition is essential to the exercise of treaty rights. As I understand it, the majority opinion states the determinative question to be whether appellants have descended from treaty signatories and have maintained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions. Tribal status is preserved "if some defining characteristic of the original tribes persists in an evolving tribal community." Ante, at pp. 1372-1373. With all of these propositions I agree.

My difference with the majority is that I am unable to say that the findings of the district court resolve the determinative question of tribal continuity or

provide us with the means to do so upon review. It is true that the district court found that appellants had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." United States v. Washington, 476 F.Supp. 1101, 1105, 1106, 1107, 1109, 1110 (W.D.Wash. 1979). It also found that none of the appellants had "maintained an organized tribal structure in a political sense." Id. at 1105, 1106, 1108, 1109, 1110. These findings, however, do not take account of the nature and degree of tribal organization existing at the time of the treaties. They are not addressed to the proper requirement that "some defining characteristic of the original tribes persist in an evolving tribal community." They appear instead to reflect a more stringent requirement of tribal organization -- a requirement based upon the erroneous assumption that federal

recognition is essential to the exercise of treaty rights.

Other findings of the district court reflect the degree to which the assumed need for federal recognition permeated the entire factual inquiry. The following finding regarding the Samish Tribe is typical and illustrative:

> (25). The Intervenor Samish Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements nor membership roll has been approved or recognized by Congress or the Department of Interior for purposes of administration of Indian affairs.... Id. at 1106.

It seems evident in this finding that the "attributes of sovereignty" found to be lacking in the Samish Tribe are those arising from federal recognition.

The conclusions of law make quite clear what was meant by the district

court in its factual findings that the appellants did not maintain continuous cultural or political communities or organized tribal structures in a political sense. The first conclusion of law recites that fishing rights are communal and "are held today for the use and benefit of the persons who continue to maintain a tribal structure exercising governmental or political powers." Id. at 1110. The second conclusion then lists certain factors for determining "whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing special political relationship with the United States ..."[1/]

1/ To the extent that this conclusion suggests that the existence of a trust relationship with the United States is essential to the exercise of treaty rights, it is erroneous. Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974).

Id. Two of the six factors -- the extent of Indian governmental control over members' lives and the extent of political control over a specific territory -- are largely functions of federal recognition, while the final factor is federal recognition itself: "The extent of express acknowledgment of such political status by ... federal authorities." The fourth conclusion of law then states that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." Id. at 1111. This progression clearly has the effect of requiring federal recognition in order for a tribe to have the type of structure enabling it to exercise treaty rights.

If this error were confined to the conclusions of law, then affirmance might nevertheless be in order. But the conclu-

sions of law help to illustrate the deficiencies of the findings of fact upon which the decision of the district court is based. The findings that appellants had not maintained a "continuous separate, distinct and cohesive Indian cultural or political communit[ies]" or "organized tribal structure[s] in a political sense" amounted in context to findings that appellants lacked federal recognition or attributes necessarily dependent upon federal recognition. These findings consequently do not resolve the crucial factual issue and cannot support the judgment.

Application of the proper legal standards to this case requires new determinations of fact, and possibly additional evidence relating to the political organization of the relevant tribes at treaty times. I would therefore remand the matter to the district court for determinations whether appellants have main-

tained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions, and whether some defining characteristic or the original tribes persists in appellants as evolving tribal communities.

APPENDIX A

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Defendants.

Civil No. 9213

United States District Court,
W.D. Washington,
Tacoma Division.

March 23, 1979.

Motion for Reconsideration Denied
April 24, 1979.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE RE TREATY STATUS OF INTERVENOR DUWAMISH, SAMISH, SNOHOMISH, SNOQUALMIE AND STEILACOOM TRIBES

BOLDT, Senior District Judge.

This matter having come on regularly before the Court, and the Court having considered the Pretrial Order (PTO), the testimony and other evidence admitted and the memoranda and oral arguments of counsel, the Court makes the following

Findings of Fact and Conclusions of Law in addition to those heretofore entered in this case, and on the basis thereof renders the following Decree:

FINDINGS OF FACT

General Findings

1. Article 2 of the Medicine Creek Treaty and Article 4 of the Point Elliott Treaty provided that the tribes and bands which were parties thereto agree to remove to and settle upon the reservations within one year after ratification of said treaties if the means were furnished them. In the years following the ratification of those treaties the United States did not enforce those provisions. A number of tribes or parts of tribes or bands which were parties to the treaties did not remove to the reservations and some Indians who did move later left the reservation, often returning to their native areas. Among the reasons for not removing to or

remaining on the reservation were: (1) the reservations were too small or otherwise inadequate for the tribes and bands assigned to them; (2) the tribes or bands were not on friendly terms with others assigned to the reservation or with the people in whose territory the reservation was located; and (3) the reservation was too far from their traditional territory. The United States did not adopt or apply a policy of requiring the western Washington tribes or bands who were parties to the treaties to remove to or remain on the reservations. (PTO Part 2 ¶3).

(2). A number of individual Indian people intermarried with non-Indians, did not accompany their respective tribes to the reservations but took up the habits of non-Indian life, and lived as citizens of the State of Washington in non-Indian communities. (Ex. USA-112; Tr. 10/29/75, 378-379).

(3). During the latter part of the 19th century and early part of the 20th century it was the policy of the United States Government to encourage the breaking up of Indian reservations and destruction of tribal relations and to settle Indians upon their own allotments or homesteads, acculturate and incorporate them into the national life, and deal with them not as nations or tribes or bands but as individual citizens. (PTO Part 2 ¶4; Exs. USA-123 through 128; Annual Rept. Comm'r of Ind. Affairs, 1890, p.VI).

(4). This policy was officially changed in the 1930's. (Exs. USA-129 and 130). The Indian Reorganization Act of June 18, 1934, 48 Stat. 984, was directed at implementing a policy of organizing and strengthening Indian tribal entities so as to manage their own affairs and to promote their civic and cultural freedom and opportunity and their own economic

rehabilitation. By the Indian Reorganization Act, the descendants of the treaty tribes associated with most of the reservations voted to reorganize pursuant to that Act as Indian tribes and political entities under federally-approved constitutions and bylaws having express and implied governmental and proprietary powers and with original inherent sovereign tribal powers preserved to the extent not restricted by federal law. Except for a brief policy in the 1950's of encouraging termination of federal supervision and administration of Indian affairs, the policy of encouraging tribal organization and greater self-management of internal affairs has continued and increased. (PTO Part 2 ¶4; Ex. USA-130 pp. 418-421; Tr. 12/6/74, 212-214).

(5). In the period around 1916-1919 the Bureau of Indian Affairs caused an enumeration and enrollment to be made of

unattached Indians in western Washington arranged by families and tribes. Special Indian Agent Charles E. Roblin was assigned to make this enumeration and enrollment. He found that a large number of persons claiming enrollment and allotment as Indians were descendants of Indian women who married early non-Indian pioneers and founded families of mixed bloods. He reported that in many cases these applicants and families had never associated or affiliated with any Indian tribe for several decades or even generations. (Ex. USA-112).

[1,2] (6). Neither Congress nor the Executive Branch has prescribed any standardized definition for either the term "Indian" or "Indian tribe" in terms of the special federal relationships with Indians. (Ex. USA-110, pp.138-139). The term "Indian" is used in several contexts including biological descent, cultural

identity and legal status. (Id.) The term "tribe" is most commonly used in two senses, an ethnological sense and a political sense although it also may be used in a social sense. (Federal Indian Law United States Department of the Interior (1958) p.454).

(7). As a major aspect of the new federal Indian policy adopted in the 1930's Congress enacted the Indian Reorganization Act of 1934. One of its major purposes was to authorize and facilitate the reorganization and revitalization of Indian tribal political entities. (Ex. T-22; Exs. USA-129 and 130). While existing recognized tribes did not have to accept the Act, and many did not, it did provide a means by which tribes which had lost their political authority and recognition could regain it.

(8). The legislative history of the Indian Reorganization Act of 1934 shows

that in determining who was to be considered an Indian for the purpose of such tribal reorganization Congress rejected the Department of the Interior's recommendation that persons who were not members of recognized tribes then under federal jurisdiction or their on-reservation descendants could participate in such reorganization if they were of one-fourth or more Indian blood. Instead Congress required that such persons be of one-half or more Indian blood. Representative Howard, the House sponsor and floor leader for the bill, explained during debate that the definition (now 25 U.S.C. §479) defines who shall be classed as Indians for the purposes of the Act. He said:

> "In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood. The latter provision is intended to prevent persons of less than one-fourth [later changed to one-half] Indian blood who are not already enrolled members of a tribe

> or descendants of such members living on a reservation from claiming the financial and other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burden in extending wardship over persons with a minor fraction of Indian blood." (Ex. T-22; Congressional Record, June 15, 1934, p. 12056).

(9). As used in (a) these Findings Nos. 1 to 59, inclusive, (b) in the Findings and Judgment awards of the Indian Claims Commission referred to in said Findings and in the requirements for the preparation of rolls for distribution of said Judgment awards, and (c) in the membership requirements of each of these Intervenor entities, the terms "descendant" or "persons of Indian blood" means any person whose lineage includes any ancestor who was an Indian or a member of the referenced Indian tribe, community or other group. This is also true of the term "persons of Indian blood" unless a particular minimum degree of such blood

or descent is specifically prescribed.

(10). The Court of Claims has determined and held that the Indian Claims Act of 1946, 60 Stat. 1049, allows claims to be prosecuted under that Act on behalf of Indian tribes, bands or communities that have ceased to exist as such, if brought as a representative action on their behalf by a group whose members can be identified as members or descendants of members of a previously existing tribe. (Thompson v. United States, 122 Ct.Cl. 348 (1952)).

(11). These five Intervenor tribes are not the beneficial owners of the Judgments that have been awarded under the Indian Claims Act on the claims prosecuted by them. Such Judgment Awards of the Intervenor Duwamish, Samish, Snohomish, and Snoqualmie tribes have been or will be distributed, pursuant to Acts of Congress dealing with such judgments, on a per capita basis to persons determined by the

Secretary of the Interior to be descendants of members of the treaty-time tribes. (80 Stat. 910, 85 Stat. 83, 87 Stat. 466, 41 F.R. 5140) Distribution of the Steilacoom award has yet to be determined. (87 Stat. 466; Ex. USA-107, p.4).

(12). None of the five Intervenor entities whose status is considered in these Findings is at this time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott.

Specific Findings as to Intervenor Duwamish Tribe[1/]

(13). The Intervenor Duwamish Tribe of Indians (herein referred to as the

1/ The use of the word "tribe" in identifying each of the Intervenors herein does not constitute a Finding or Conclusion that such Intervenor is presently an Indian tribe in either the political or the ethnological sense except where a Finding or Conclusion is specifically addressed to that issue.

the Intervenor Duwamish Tribe) is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Dwamish Indians and who were party to the Treaty of Point Elliott, 12 Stat. 927. The 1855 Dwamish Indian were named in said treaty and four signatories were identified as signing for that tribe including the Suquamish chief, Seattle, who signed as chief of the Dwamish and Suquamish. (PTO Part 2 ¶¶1 & 2; Ex. USA-102 p.23; Ex. USA-73 p.9; Ex. G-17a pp. 5-120-5-121). Estimates of the number of Dwamish at treaty time vary but Agent Paige reported 375 in November 1856, most of whom were on the Fort Kitsap (Port Madison) Reservation. (Ex. USA-102 pp. 4-5).

(14). Originally the Dwamish were intended to be settled on the Port Madison Reservation (aka Fort Kitsap) located in Suquamish territory. They

objected to being moved there and recommendations of government officials for a separate reservation for them were not acted upon. (Ex. USA-102 pp. 3-12; Ex. G-17a pp. 5-118-5-125). Some of the Dwamish moved to the Port Madison, Muckleshoot or other reservations and some of their descendants now reside with and are members of those reservation communities. (Ex. USA-1[illegible] pp. 2, 4-5).

(15). The Intervenor Duwamish Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 109 which resulted in a monetary judgment award. (Ex. G-17(a)). The Act of October 14, 1966, 80 Stat. 910; 25 U.S.C. §§ 1131-1135, provided for the Secretary of the Interior to prepare a roll of then living descendants of the Duwamish Tribe as it existed in 1855, and to distribute the funds so awarded to the persons on such roll. A judgment roll of

1166 persons was prepared for this purpose. (Tr. 10/29/75, 301; Tr. 10/30/75, 432).

(16). The Intervenor Duwamish Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements or membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 ¶2; Ex. USA-107). Said Intervenor has a constitution and bylaws and purports to operate as an identifiable and distinct entity on behalf of its members. (Ex. DU-19). It has, pursuant to said constitution and bylaws, a tribal council and a tribal chairman. The Intervenor tribe

uses as a base for its membership the above-referenced judgment roll. (Tr. 12/18/74, 131-142; Tr. 10/29/75, 300-312). It has no current roll approved by the tribe but claims to be working on such a roll. (Tr. 10/29/75, 305-312).

(17). The Duwamish constitution requires members to be persons of Indian blood only, and descendant of the Duwamish Tribe. (Ex. DU-19). The tribe has consistently interpreted this as not requiring full-blood Indian (Tr. 10/29/75, 301), and most members are less than that. (Tr. 12/18/74, 131-132). The tribe has made no determination whether to exclude Canadians of Duwamish descent from membership. (Tr. 10/29/75, 304-305). About 50 to 60 persons pay yearly membership dues on a voluntary basis. (Tr. 12/18/74, 154).

(18). The members of the Intervenor Duwamish Tribe and their ancestors do not and have not lived as a continuous

separate, distinct and cohesive Indian cultural or political community. Present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Ex. USA-115 secs. 1, 2(b), 7; Tr. 10/29/75, 319).

(19). The Intervenor Duwamish Tribe has had dealings with agencies of the United States, the State of Washington and local governments and with private organizations and Indian tribes, but said dealings were not different in substances from those engaged in by any social or business entity. (Exs. USA-107 pp. 5-7; and USA-115 sec. 1; Tr. 10/29/75, 313-317).

(20). The Intervenor Duwamish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(21). The citizens comprising the

Intervenor Duwamish Tribe have not maintained an organized tribal structure in a political sense.

Specific Findings as to Intervenor Samish Tribe

(22). The Intervenor Samish Indian Tribe (herein referred to as the Intervenor Samish Tribe) is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott. The 1855 Samish were not named in the treaty but were assigned, for the purpose of including them in the treaty, to the Lummi signer, Chow-its-hoot, who signed the treaty for the Lummi and the other northern bands. (PTO Part 2 ¶¶1 and 2; Ex. USA-75 pp. 8-9). Official estimates of the number of Samish at treaty times varied from about 98 to about 150 persons. (Ex. USA-75 p.13).

(23). Pursuant to the treaty most of the Samish people initially moved to the Lummi Reservation. Later others moved to the Swinomish Reservation. The present-day Lummi and Swinomish Reservation tribes include descendants of the 1855 Samish Indians. (Ex. USA-75 pp. 2, 14-16; Ex. USA-30; Ex. USA-74, pp. 3-4).

(24). The Intervenor Samish Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 261 which resulted in a monetary judgment award. (Ex. USA-111). This award will be distributed per capita to the descendants of the Samish Tribe of Indians as it existed in 1859, born on or prior to and living on the effective date of the plan prepared by the Department of the Interior for the use and distribution of judgment funds. (41 F.R. 5140, Feb. 4, 1976).

(25). The Intervenor Samish Tribe

exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements nor membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 ¶2). Said Intervenor has adopted a constitution and bylaws pursuant to which it has a tribal council and a tribal chairman and purports to operate as an identifiable and distinct entity on behalf of its members. It claims 549 members. (Ex. SA-M-2; Ex. SA-79).

(26). The Intervenor Samish Tribe's constitution provides that its membership shall consist of all persons of Indian

blood whose names appear on the official membership roll of the Samish Tribe to be dated June 1, 1975, as prepared by the Secretary of the Interior, and all persons born to any member of the Samish Tribe. (Exs. SA-M-2 and SA-M-3; Tr. 10/29/75, 267). No such roll is now in existence. (Exs. USA-M-16 and USA-107, p.3). There is no requirement of specific minimum blood quantum either as to Samish blood in particular or Indian blood in general. (Exs. SA-M-2 and SA-M-3; Tr. 10/29/75, 273-274). The Intervenor's membership roll contains 549 persons many of whom are of only 1/16th degree Indian blood. Two have only 1/32nd Samish blood. (Ex. SA-79). The tribe does not prohibit dual membership and at least one member is an officer of the Lummi Tribe. (Tr. 10/29/75, 273).

(27). The members of the Intervenor Samish Tribe and their ancestors do not

and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Ex. USA-107; Tr. 10/29/75, 232-235).

(28). The Intervenor Samish Tribe has had dealings with agencies of the United States, the State of Washington, and local governments and with private organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity. (Ex. USA-107 pp. 5-7).

(29). The Intervenor Samish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(30). The citizens comprising the

Intervenor Samish Tribe have not maintained an organized tribal structure in a political sense.

Specific Findings as to Intervenor Snohomish Tribe

(31). The Intervenor Snohomish Tribe of Indians (herein referred to as the Intervenor Snohomish Tribe) is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snohomish Indians, who lived in the vicinity of the Snohomish River and tributary streams, and who were named in and were a party to the Treaty of Point Elliott. Ten signers were identified as Snohomish. According to George Gibbs' 1855 census, there were 441 Snohomish Indians. (PTO Part 2 ¶¶1 and 2; Ex. USA-103, pp. 1-3).

(32). The Snohomish Reservation described in the treaty (later absorbed into the larger Tulalip Reservation) was

intended for the Snohomish and other Indians and the majority of the members of the Tulalip Tribes are of Snohomish ancestry. However, a large number of Snohomish descendants did not become members of the Tulalip Reservation community. (Ex. USA-103, pp. 6, 12; Tr. 10/29/75, 396).

(33). The Intervenor Snohomish Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 125 which resulted in the award of a monetary judgment. (Ex. G-17n; T-1). By the Act of June 23, 1971, 85 Stat. 83, Congress directed the Secretary of the Interior to prepare a roll of all persons then living who were lineal descendants of members of the Snohomish Tribe as it was constituted in 1855, other than persons who had shared or were eligible to share in a per capita distribution of a judgment against the United States recovered by any other tribe.

The act directed that the Snohomish judgment be distributed per capita to the persons on said roll. Such a roll is now being prepared. (Ex. USA-107, p.3).

(34). The Snohomish constitution requires members to be persons of Snohomish Indian blood whose names appear on the Roblin schedule of unenrolled Indians, or persons of Indian blood whose names appear on the Snohomish membership rolls, or children born to any member of the Snohomish Tribe. There is no requirement of specific minimum blood quantum either as to Snohomish blood in particular or Indian blood in general. (Ex. SNH-M-10; Tr. 12/18/74, 32-35).

(35). The Intervenor Snohomish Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of govern-

ment over any individuals or territory. None of its organizational structure, governing documents, membership requirements or membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 ¶2). Said Intervenor is organized as a corporate entity under Washington state law with a constitution and articles of incorporation and bylaws filed with the State of Washington as a nonprofit corporation and purports to operate as an identifiable and distinct entity on behalf of its members. (Exs. SNH-M-10 and SNH-M-11; Ex. T-M-5). It has, pursuant to such constitution and bylaws, a tribal council and a tribal chairman. It claims 720 members. (Ex. SNH-53).

(36). The members of the Intervenor Snohomish Tribe and their ancestors do not and have not lived as a continuous

separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such assocation as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Tr. 10/29/75, pp. 378-379, 385-386).

(37). The Intervenor Snohomish Tribe has had dealings with agencies of the United States, the State of Washington and local governments and with private organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity. (Ex. USA-107, pp. 5-7).

(38). The Intervenor Snohomish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(39). The citizens comprising the Intervenor Snohomish Tribe have not

maintained an organized tribal structure in a political sense.

Specific Findings as to Intervenor Snoqualmie Tribe

(40). The Intervenor Snoqualmie Tribal Organization (herein referred to as the Intervenor Snoqualmie Tribe) is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmie Indians and of other bands of Indians who resided in the general vicinity of the Snoqualmie River. The Snoqualmoo were named in and a party to the Treaty of Point Elliott. Fourteen signers of the treaty were identified as Snoqualmoo, including their chief, Patkanim. (PTO Part 2 ¶¶1 & 2; Ex. USA-104 pp. 30-33). There are conflicting reports on the number of Snoqualmoo at treaty times but estimates in the neighborhood of 300-400 were made in both the 1850's and 1870. (Ex. G-17o pp. 291-

295; Ex. USA-104 pp. 4-6, 9-10).

(41). The Snohomish Bay Reservation described in the treaty (later absorbed into the Tulalip Reservation) was intended for the Snoqualmie Indians whom the treaty negotiators included with the Snohomish. (Ex. USA-104 p.4). Some of the Snoqualmie Indians settled on the Tulalip Reservation and many of their descendants are members of the Tulalip Tribes. Some were officially enrolled as members of other Indian reservation communities. But most remained off reservation. (Ex. USA-104 pp. 2, 8; Ex. USA-113). Periodically from as early as 1856 to as recently as the 1940's local Bureau of Indian Affairs officials recommended the establishment of a reservation for some of the latter but the recommendations were not acted upon. (Ex. USA-104 pp. 2, 4; Ex. USA-118 p. 65).

(42). The Intervenor Snoqualmie Tribe on its own behalf and on relation of

the Skykomish Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 93 which resulted in a monetary judgment award. (Ex. G-17o; Ex. T-2). By the Act of June 23, 1971, 85 Stat. 83, Congress directed the Secretary of the Interior to prepare a roll of all persons then living who were lineal descendants of members of the Snoqualmie and Skykomish Tribes as they were constituted in 1855. (Ex. USA-M-17). The Act directed that the Snoqualmie-Skykomish judgment be distributed per capita to the persons on such roll. Such a roll is now being prepared. (Tr. 10/30/75, 431).

(43). The Snoqualmie constitution provides that any person with 1/8th degree or more of Snoqualmie Indian blood is acceptable for membership. (Ex. SNQ-1; Ex. SNQ-2). The group's roll was not discussed with BIA. (Tr. 10/28/75, 134). As

a result they included some people who were enrolled in another nontreaty tribe (Tr. 10/28/75, 146) and some who are not carried on the Government's rolls as Snoqualmie. (Ex. USA-108, pp. 131, 132 and 133; Tr. 10/30/75, 411-419).

(44). In 1953 the BIA reported to Congress that the Snoqualmie Indian Tribe:

> ". . . was not formulated for self-government as members of this band are widely scattered and live in non-Indian communities and are independent and well aware of responsibilities for their own welfare." (Ex. USA-114 p.1).

(45). The Intervenor Snoqualmie Tribe exercises no attributes of sovereignty over its members or any terriotry. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements nor membership roll has been

approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 ¶2; Ex. USA-107; Ex. SNQ-7). Said Intervenor has a constitution and bylaws and purports to operate as an identifiable and distinct entity on behalf of its members. (Ex. SNQ-1). It has, pursuant to said constitution and bylaws, a tribal council and a tribal chairman. It lists 284 persons on its proposed roll. (Ex. SNQ-2).

(46). The Intervenor Snoqualmie Tribe has had dealings of the United States, the State of Washington and local governments and with private organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity. (Ex. USA-107; Ex. SNQ-7).

(47). The members of the Intervenor Snoqualmie Tribe and their ancestors do

not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residences or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Tr. 10/28/75 p. 111; Tr. 12/6/74 p. 219).

(48). The Intervenor Snoqualmie Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(49). The citizens comprising the Intervenor Snoqualmie Tribe have not maintained an organized tribal structure in a political sense.

Specific Findings as to Intervenor Steilacoom Tribe

(50). The Intervenor Steilacoom Tribe of Indians (herein referred to as the Intervenor Steilacoom Tribe) is com-

posed primarily of persons who are descendants in some degree of Indians who in 1854 were known as Steilacoom or Steilakumahmish Indians, who lived on the southern shore of Puget Sound opposite Fox, McNeil, Anderson and Ketron Islands in the general vicinity of what is now the town of Steilacoom, and who were named in and a party to the Treaty of Medicine Creek. (10 Stat. 1132) (PTO Part 2 ¶¶1 & 2; Ex. USA-105 pp. 1, 8). S.S. Ford, Jr., who was in charge of the temporary Fox Island Reservation, reported that 120 Steilacoom Indians were on the reservation in May 1856. (Ex. USA-105 pp. 3-4).

(51). After the temporary Fox Island Reservation was abandoned some of the Steilacoom people removed to the Nisqually Reservation, some to the Puyallup Reservation and some evidently returned to their traditional homes. (Ex. USA-105 pp. 6, 10). Some may also be enrolled as Muckle-

shoot Indians. (Ex. USA-119 p. 1). Present members of the Intervenor Steilacoom Tribe trace descent from a relatively small number of families who were resident in the Steilacoom area in 1854. (Ex. USA-105 p. 7).

(52). In 1937 the Superintendent of the Taholah Agency reported that the Steilacoom Indians "have functioned as a tribal group only for the purpose of filing a petition in the Court of Claims . . .." (Ex. USA-119 p. 1).

(53). The Intervenor Steilacoom Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 208 which resulted in a monetary judgment award that has been appealed by the tribe. (Ex. G-17(j)). After the appeal has been resolved, the use or distribution of any finally awarded funds will be determined under the provisions of the Act of

October 19, 1973, 87 Stat. 466. (Ex. USA-107 p.4).

(54). The Intervenor Steilacoom Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements or membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 ¶2; Ex. USA-107). Said Intervenor tribe presently operates as an identifiable and distinct entity on behalf of its members under a constitution and bylaws recently adopted by its members to replace earlier such documents. (Ex. SC-8; Ex.SC-35 pp. 2-3; Tr. 10/28/75 pp. 171-172).

Pursuant to said constitution it has a tribal council and a tribal chairman. Membership consists of (a) all children born to any "enrolled member of the Steilacoom Tribe", (b) all persons of Steilacoom Indian blood "whose names appear on the membership rolls of the Steilacoom Tribe before adoption of this [1975] constitution", (c) all persons of Steilacoom Indian blood whose names appear on the Roblin Schedule of Unenrolled Indians, and (d) all descendants of persons of Indian ancestry. Except for the Roblin Schedule, none of these rolls was prepared or approved by the Secretary of the Interior. No specific minimum blood quantum is required and a number of members are no more than 1/8th degree Steilacoom blood. (Ex. SC-8 pp. 1-2; Ex. USA-108; Ex. USA-109). It presently claims 359 members, of whom 73 are adopted members. The others trace their descent from nine

Steilacoom families. (Ex. SC-6). Most but not all of the adopted members claim some ancestry from Indians who were members of tribes or bands that were parties to the Treaty of Medicine Creek. (Ex. SC-6). BIA has not been consulted in the preparation of the tribe's membership roll. (Tr. 10/28/75, 163, 196).

(55). The members of the Intervenor Steilacoom Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Ex. USA-107; Tr. 12/6/74, 219).

(56). The Intervenor Steilacoom Tribe has had dealings with agencies of the United States, the State of Washington and local governments and with private

organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity. (Ex. USA-107).

(57). Significant numbers of the members of the Intervenor Steilacoom Tribe are not descended from the Steilacoom or other Indians who were parties to the Treaty of Medicine Creek.

(58). The Intervenor Steilacoom Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Medicine Creek.

(59). The citizens comprising the Intervenor Steilacoom Tribe have not maintained an organized tribal structure in a political sense.

CONCLUSIONS OF LAW

[3] (1). The fishing rights secured by the treaties of Medicine Creek and Point Elliott are communal rights which belong to the Indians with whom the

treaties were made in their collective sovereign capacity. Being communal in nature these rights are not inheritable or assignable by the individual members to any person, party or other entity of any kind whatsoever. They are held today for the use and benefit of the persons who continue to maintain a tribal structure exercising governmental or political powers.

[4] (2). In determining whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing special political relationship with the United States, the extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community, the extent of Indian governmental control over their lives and activities, the extent and nature of the

members' participation in tribal affairs, the extent to which the group exercises political control over a specific territory, the historical continuity of the foregoing factors, and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians are all relevant factors to be considered.

[5] (3). By the Stevens treaties and by other actions of the United States, the Indian tribes which were parties to said treaties, and their members, came under the jurisdiction of the United States, and the determination of what entities may exercise political control over communal rights secured by treaties with respect to the taking of fish and other wildlife is a political question requiring determination

or concurrence by the political authorities of the United States.

[6] (4). Only tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States.

[7] (5). Federal jurisdiction to authorize or secure immunities from state fish and game laws otherwise applicable to citizens or persons within the state, relevant to this proceeding, is derived solely from the Federal Government's plenary powers with respect to Indian affairs. The jurisdiction does not exist except with respect to persons or entities which are "Indians" or "Indian Tribes," respectively, in the political sense as acknowledged by the United States.

[8] (6). None of the Intervenor entities, Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom Tribes herein,

is at this time a treaty tribe in the political sense within the meaning of Final Decision No. 1 and the related Orders of the Court in this case.

(7). None of the Intervenor entities, Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom Tribes herein, presently holds for itself or its members fishing rights secured by any of the Stevens treaties identified in Final Decision No. 1 in this case.

DECREE

Based on the above Findings of Fact and Conclusions of Law, it is hereby adjudged and decreed that the Intervenor entities, Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom Tribes, do not have and may not confer upon their members fishing rights under the Treaties of Point Elliott and Medicine Creek.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs, and SAMISH, SNOHOMISH, SNOQUALMIE and STEILACOOM INDIAN TRIBES, Plaintiff-Intervenor Appellants, and DUWAMISH INDIAN TRIBE, Plaintiff-Intervenor/Appellant, v. STATE OF WASHINGTON, et al., Defendants.	No.79-4447 No.79-4472 ORDER

Before: WRIGHT and CANBY, Circuit Judges, and PATEL, District Judge.*

The opinion filed on April 20, 1981 is ordered to be corrected as follows:

Page 1618 of the slip opinion: The

*Of the Northern District of California.

second sentence in the first complete paragraph should be corrected to read:

> Moreover, although some of the other considerations mentioned by the district court may be relevant, they do not adequately define the controlling principles.

Filed and entered April 22, 1981.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs, and SAMISH, SNOHOMISH, SNOQUALMIE, and STEILACOOM INDIAN TRIBES, Plaintiff-Intervenor/Appellants, and DUWAMISH INDIAN TRIBE, Plaintiff-Intervenor/Appellant, v. STATE OF WASHINGTON, et al., Defendants.	NO.79-4447 NO.79-4472 ORDER

Before: WRIGHT and CANBY, Circuit Judges, and PATEL, District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing, and to reject the suggestions for a rehearing en banc, filed by the

respective tribes on May 4 and May 7, 1981.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

Filed and entered June 5, 1981.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs, and SAMISH, SNOHOMISH, SNOQUALMIE and STEILACOOM INDIAN TRIBES, Plaintiff-Intervenor/Appellants, and DUWAMISH INDIAN TRIBE, Plaintiff-Intervenor/Appellant, v. STATE OF WASHINGTON, et al., Defendants.	NO.79-4447 NO.79-4472 ORDER

Before: WRIGHT and CANBY, Circuit Judges, and PATEL, District Judge.*

The order filed April 22, 1981, is vacated. The opinion filed April 20, 1981, is ordered to be corrected as follows:

On page 1618 of the slip opinion, the

*Of the Northern District of California.

second sentence of the first complete paragraph in the second column shall read:

> Moreover, although some of the other considerations mentioned by the district court may be relevant, they do not adequately define the controlling principles.

Filed and entered June 8, 1981.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,	
Plaintiffs,	
and	
SAMISH, SNOHOMISH, SNOQUALMIE, and STEILACOOM INDIAN TRIBES,	NO.79-4447
Plaintiff-Intervenor Appellants,	
and	
DUWAMISH INDIAN TRIBE,	NO.79-4472
Plaintiff-Intervenor Appellant,	
v.	
STATE OF WASHINGTON, et al.,	
Defendants.	

APPEAL from the United States District Court for the Western District of Washington (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United

States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 22, 1981.

APPENDIX C

TREATY OF POINT ELLIOTT, JAN. 22, 1855

(12 Stat. 927. Ratified March 8, 1859).

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwamish, Suquamish ....and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore

ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the

islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the south-eastern end of Perry's Island, called Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts

shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indian being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all

the Indians living west of the Cascade Mountains in said Territory. Provided, however, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary

houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner -- that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said

sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the Presdient of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and

he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands

acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as

that prescribed in this article in cases of depredation against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and

bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agrees to establish at the general agency for the district of Puget's Sound within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and indus-

trial school, to be free to children of the said tribes and bands in common with those of other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the

President and the Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent. [L.S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark.

... [There follows the names of the other chiefs and headmen].

Executed in the presence of us --

M.T. Simmons, Indian agent

C.H. Mason, Secretary of Washington Territory

Benj. F. Shaw, Interpreter.

APPENDIX C

TREATY WITH THE NISQUALLI,

PUYALLUP, ETC., 1854

(10 Stat. 1132. Ratified March 3, 1855).

(Proclaimed April 10, 1855).

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indians affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homanish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit:

Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a south-easterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2. There is, however,

reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or

agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together

with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

ARTICLE 4. In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each

year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 6. The President may hereafter when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the

Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the

Government out of their annuities. Nor will they make war on any other tribe exception in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes,

who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States

further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. The treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the

President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and
Superintendent Territory of
Washington. [L.S]

Qui-ee-metl, his x mark.

... [There follows the names of the other chiefs and headmen].

Executed in the presence of us --

M.T. Simmons, Indian agent.

James Doty, secretary of the
commission

... [and others].

APPENDIX D

LIST OF PARTIES IN
UNITED STATES v. WASHINGTON

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1

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CLERK

NO. 81-509

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

UNITED STATES OF AMERICA, et al.,
Plaintiffs,
and
DUWAMISH, SAMISH, SNOHOMISH
SNOQUALMIE and STEILACOOM TRIBES,
Intervenor-Petitioners,
v.
STATE OF WASHINGTON, et al.,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT THE TULALIP TRIBES OF WASHINGTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it proper for the court of appeals to affirm the district court on an alternative ground clearly supported by the record?

2. Is it necessary for a court of appeals to remand for further findings where, from the insufficiency of the evidence, on the face of the record, it is clear that the correct result was reached?

3. If the court of appeals erred in holding that federal non-recognition had no relevance to a determination of petitioners' tribal treaty status, is review warranted where petitioners' claims herein depend upon the determination that federal non-recognition has no relevance?

4. Does the court of appeals' decision conflict with this Court's

decision in United States v. John, 437 U.S. 634 (1978) by applying an incorrect test to determine whether the petitioner tribes are so assimilated that they cannot hold treaty rights?*

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*A list of all parties to the proceeding can be found in Appendix A.

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JURISDICTION

CONSTITUTIONAL, TREATY AND FEDERAL RULE PROVISIONS

See petition for writ of certiorari, pages 2-4.

STATEMENT OF THE CASE

1. The Nature of the Case and Proceedings Below

After the district court trial in United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974) ("Final Decision I")[1], petitioners/intervenor

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[1] Aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), United States v. State of Washington, 459 F.Supp. 1020 (W.D.Wash. 1974-1978) ("Post-Trial Decisions"); various appeals dismissed, 573 F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), decisions at 459 F.Supp. 1020, 1097-1118 (W.D.Wash. 1977-1978), aff'd sub nom. Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington, 573 F.2d 1123 (9th Cir. 1978), aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

groups intervened claiming treaty fishing rights under the Treaties of Point Elliott (12 Stat 927) and Medicine Creek (10 Stat 1132) (Stephen's Treaties). ER[2] 1-23.

The district court referred the question of the intervenor group's treaty status to a master, ER 24-25, who conducted a three-day hearing and determined that these groups of people were not tribes possessing treaty fishing rights. CR[3] 1023.

After a further three-day trial in which the district court considered the evidence before the Master, and received additional evidence, the district court issued its Findings of Fact, Conclusions

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[2]Refers to excerpts of clerk's record filed in Ninth Circuit per local rule 13 (A).

[3]Refers to documents in clerk's record, by docket number, that were not included in excerpts of clerk's record referenced in footnote 1.

of Law, and Decree, reported at 476 F.Supp. 1101, in which the district court also determined that the intervenor groups are not tribes possessing treaty fishing rights.

The Ninth Circuit Court of Appeals affirmed the district court, holding that the district court had erred in considering federal recognition in determining petitioners tribal treaty status; but that to exercise treaty fishing rights, groups of Indians whose members are descendants of members of treaty signatories must have maintained an organized tribal structure; and that the evidence supported the district court's finding that petitioners have not functioned since treaty times as continuous seperate, distinct, and cohesive Indian cultural or political communities.

The Ninth Circuit's opinion is reported at 641 F.2d 1368.

The petitioner/intervenor groups then petitioned this court for a writ of certiorari.

2. Statement of Facts

This brief by the Tulalip Tribes will primarily focus on the claims of the intervenor groups denominating themselves as Snohomish and Snoqualmie.

The Tulalip Tribes actively participated in the trial below, and in the proceedings before the Ninth Circuit, contending that the Snohomish and Snoqualmie groups are not Indian tribes now, have not been Indian tribes in the past, and are not successors in interest to the Snohomish and Snoqualmie Indian tribes which were signatories to the Treaty of Point Elliott; and that the Tulalip Tribes are the political successors in

interest to the Snohomish and Snoqualmie Tribes which were treaty parties.[4]

a. On-Reservation Snohomish and Snoqualmie

The parties stipulated and the district court found that the Snohomish tribe (who lived in the vicinity of the

---

[4]The district court has found: "that the Indians who settled on the Snohomish reserve and the Tulalip Reservation, and whose descendants comprise the numerical majority of the present Tulalip Tribes, were members of tribes known today as Snoqualmie, Snohomish, and Skykomish." 459 F. Supp. at 1060. And the district court has ruled that the Tulalip Tribes are a political successor in interest to "certain" treaty tribes. Id., at 1039. A ruling that the Tulalip Tribes are successors in interest to the Snohomish and Snoqualmie tribes would be dispositive of the petitioners' claims. However, while the Tulalip Tribes feel that such a ruling would be warranted, the district court did not have to reach this question to determine that the petitioners do not have treaty fishing rights, since the record herein does not establish that the petitioners have existed as Indian tribes historically since treaty times, or that they presently live as Indian tribes.

Snohomish River and tributary streams) and the Snoqualmie Tribe (who lived in the general vicinity of the Snoqualmie River) of the mid-19th century were parties to the Treaty of Point Elliott. 476 F. Supp. at 1107, 1108 (Findings 31 and 40). The Snohomish Reservation described in the treaty (later absorbed into the larger Tulalip Reservation) was intended for the Snohomish and Snoqualmie Tribes. 476 F. Supp. at 1107, 1108 (Findings 32 and 41). Ex. U.S. 103, p. 3; Ex. U.S.A.-104, p. 4. Article IV of the Point Elliott Treaty provided the treaty tribes would remove to the reservation within one year. 476 F. Supp. 1102 (Finding 1).

The district court found that a number of Snohomish and Snoqualmie moved to the Tulalip Reservation and that a majority of the members of the Tulalip Tribes are of Snohomish ancestry and

many Snoqualmie descendants are members of the Tulalip Tribes. 476 F.Supp. 1107, 1108 (Findings 32 and 41). Ex. USA-103, USA-104. The record reveals that most of the Snohomish people moved to the reservation initially, Ex. U.S.A.-103, p. 13, RTM[5] 12/6/74, 202, 204-205, 318, 321-22, 334, RT 10/28/75, 57, 180 et seq., RT 10/29/75, 350. However, many Snohomish did not become members of the reservation community. Finding 32; Ex. U.S.A.-103.

At treaty times, many Snoqualmie went to the Tulalip Reservation. RTM 12/6/74, 321-22, RT 10/29/75, 350. An 1856 letter from the Indian agent in charge of the reservation states that all of the Snoqualmie and Snohomish came to the reservation. RTM 12/6/74, 339. An 1856 census

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[5]RT refers to transcript of hearings before the district court, and RTM refers to transcript of hearings before the master.

of Snoqualmie on the reservation shows 119 heads of family, not indicating spouses and children. RTM 12/6/74, 336. There are no figures available to show how many of these left. Id., 337. The district court found that while some Snoqualmie settled on the reservation and many of their descendants are Tulalips, most Snoqualmie remained off the reservation. 476 F. Supp. at 1108 (Finding 41).

Many of the Snohomish, and some Snoqualmie leaders came to the reservation, RT 10/29/75, 353-356; and the communal groups of Indians on the reservation continued to have chiefs from treaty times on, RT 10/29/75, 360-363. The United States, in 1862, recognized that the Snohomish Tribe was living on the reservation and designated Club Shelton its chief. RT 10/29/75, 362. Ex. T-10. The Snoqualmies on the reservation in

1870, 1900, and 1910 had people they recognized as their leaders. RT 10/29/75, 364.

The on-reservation Indians lived as tribes, having weekly meetings, and tribal activities such as land clearing, road building, building cemeteries, and getting doctors and housing. RT 10/29/75, 366-377.

In the 1920's, the Snohomish Indians formed an organization for prosecuting a claim against the United States in the Court of Claims. The case was lost in 1935. RTM 12/18/74, 192-194. The minutes of this organization are in evidence as Exhibit T-8. Although some off-reservation Snohomish belonged to this group, most of the members were on-reservation Snohomish. RT 10/29/75, 212. After the claims case was lost, the group and organization pursuing the claim disbanded. RTM 12/18/74, 197; RT 10/29/75, 371-374.

The Indians living on the Tulalip Reservation organized as the Tulalip Tribes of Washington under the Indian Reorganization Act (48 Stat. 987, 25 USC §476), in 1934, and the Tulalip Tribes of Washington is recognized by the United States as a currently functioning Indian tribe maintaining the tribal government on the Tulalip Indian reservation in Snohomish County, Washington. See United States v. Washington, 459 F. Supp. 1020, 1039 (1978); and TR 10/29/75, 380-82. As noted in footnote 4, the district court has found that the Tulalip Tribes are political successors in interest to "certain parties to the Treaty of Point Elliott", 459 F. Supp. at 1039; and has defined the Tulalip Tribes' usual and accustomed fishing areas, 459 F. Supp. at 1059-1060.

The sentiments among the on-reservation Indians who reorganized under the

Indian Reorganization Act was that the Tulalip Tribes is a confederation of the Snohomish and Snoqualmie Tribes living on the reservation, and that the name "Tulalip" (the name of a bay adjacent to the reservation) was selected to appease the pride of both groups. RT 10/29/75, 391.[6]

The general reputation of the off-reservation Snohomish among the Indians residing on the reservation was that they did not have much Indian blood and were not really Indians. RT 10/29/75, 385-386. Mrs. Harriot Shelton Dover, an on-reservation Snohomish (now Tulalip) recalled that her off-reservation relatives had intermarried with non-Indians and lived like non-Indians; and that those

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[6]Whether or not the legal effect of the IRA reorganization was a tribal merger, how the on-reservation Indians perceived the situation is excellent evidence that they regarded themselves as the Snohomish and Snoqualmie Tribes.

relatives did not receive her family well when they went visiting because she and her family were dressed and appeared as Indians. RT 10/29/75, 378-379.

b. Off-Reservation Snohomish and Snoqualmie

The parties stipulated, and the district court found, that the off-reservation Snohomish and Snoqualmie intervenor groups are comprised primarily of persons who are descendants in some degree of Indians who were members of the Snohomish and Snoqualmie Tribes which, in 1855, were treaty signatories. ER 90, 92; 476 F.Supp. at 1107, 1108 (Findings 31, 42).

The members of the intervenor Snohomish group have no reservation and own no land. RTM 12/18/74, 69. Some individuals acquired land but it was not vested in any tribe. RTM 12/6/74, 205-206. The members of the off-reservation intervenor Snohomish group do not occupy any contiguous

territory with boundaries of any kind. Id., 188. They do not occupy a territory over which they exercise any degree of control politically. Id., 168.

The quantum of Indian blood in a considerable number of the members of the off-reservation Snohomish intervenor group is only 1/16th. Ex. T-13. This exhibit shows the 1954 membership role of the off-reservation Snohomish group. Review of the exhibit indicates that the members of this group do not inhabit any particular territory, but are scattered far and wide. There was no evidence that some "core" of this group resides as a tribe in any particular area. The members of this group live in many places in the state of Washington, some live out of state. RTM 12/18/74, 67-68. Even the anthropologist, Dr. Barbara Lane, who testified on behalf of the Snohomish intervenor group, admitted that they do not today live in

Indian settlements. Ex. U.S.A.-103, p. 16.

The same lack of any territorial cohesiveness exists among the Snoqualmie intervenor group. They have no reservation and own no land. RTM 12/18/74, 175-176. Only a few families of the group reside in the Snoqualmie area. Id., 177. Some of them moved to other areas because of employment. Some married and moved. Most lived away from Snoqualmie. They are pretty well scattered throughout Washington with some out of state. Id., 177; RT 12/28/75, 111.

A number of Indians that did not go to the reservation intermarried with non-Indians and took up the habits of non-Indian life and lived as citizens of Washington in non-Indian communities. Ex. U.S.A.-112; RT 10/29/75, 378-379.

A 1971 report by the Department of Interior to the House Committee on Interior and Insular Affairs stated with

respect to the off-reservation Snohomish and Snoqualmie that:

> The Indians of the respective tribes have retained few of their cultural traits which would be considered as distinctly Indian culture, although a number of Upper Skagits and Snoqualmie Indians belong to the Indian Shaker Church. They have, in general, integrated into non-Indian communities and appear to be utilizing the services available to them as citizens.

H.R. Rep. 92-148, 92nd Cong., 1st Sess. (1971) at 13.

The only evidence of any real activity by the intervenor Snohomish and Snoqualmie groups has been related to claims cases against the United States prosecuted on behalf of descendants of members of the Snohomish and Snoqualmie tribes of treaty times which were treaty signatories. The view of the Bureau of Indian Affairs is that these off-Reservation organizations are maintained primarily for prosecuting claims against the United

States on behalf of their members. RTM 12/6/74, 169. In 1953, the BIA reported to Congress that the Snoqualmie organization:

> was not formulated for self-government as members of this band are widely scattered and live in non-Indian communities and are independent and well aware of responsibilities for their own welfare.

476 F. Supp. at 1108 (Finding 44); Ex. U.S.A.-114, p. 1.

Similarly, the organization of the present day off-reservation Snohomish intervenor group was formed in 1948 to pursue claims against the United States on behalf of their members. RTM 12/18/74, 38.

The meetings of the off-reservation Snohomish and Snoqualmie intervenor groups have primarily been concerned with the claims cases. RT 10/28/75, 131-132.

The off-reservation Snohomish group pursuing the recent claims activity and

this litigation is not the same organization formed in the 1920's that unsuccessfully pursued claims in the court of claims. As noted, that group was mostly comprised of on-reservation Snohomish, RT 10/29/75, 212, and disbanded when the claim was lost in 1935. RTM 12/18/74, 197; RT 10/29/75, 371-374. Or, as Chairman Allen of the off-reservation Snohomish intervenor group characterized it: "It was never kept up". RT 12/18/74, 49.

There was no evidence to demonstrate that petitioner groups' existed as tribes during the last half of the 19th century or the early part of this century[7].

The off-reservation Snohomish and Snoqualmie intervenor groups have no

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[7] There was no evidence that the Snohomish and Snoqualmie which came to the reservation, but later left, reunited and lived as tribes after they left the reservation.

ordinances or other regulation of their members' conduct, other than fishing ordinances which they have no power to enforce. RTM 12/18/74, 175-176 (Snoqualmie); Id., 69-70 (Snohomish). Clifford Allen, Chairman of the Snohomish intervenor group, in response to an inquiry as to whether the group had any power over its members other than to terminate the membership, said: "No, I don't believe the Council has authority to tell them what to do." Id., 70.

Finally, the off-reservation Snohomish and Snoqualmie groups are not federally recognized as tribes. Ex. U.S.A. 107, p. 2; Ex. U.S.A. 114, p. 1; ER 46; 476 F.Supp. at 1107-1108 (Findings 35, 45); Ex. SNQ-7.

No challenge to the right of petitioner/intervenor groups, or their members,

to exercise treaty fishing rights occurred until this litigation.[8]

SUMMARY OF ARGUMENT

The Ninth Circuit did not adopt new legal standards for measuring petitioners' tribal treaty status. Rather, it merely applied standards from prior decisions, that were known to the parties before the district court, and were briefed and argued to the district court. Petitioners were thus not deprived of the opportunity to present evidence relevant to the standards applied by the Ninth Circuit.

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[8]The challenge first arose in the context of a controversy in the district court concerning The Tulalip Tribes' claim to exclusive rights to fish its usual and accustomed areas, to the exclusion of members of the off-reservation Snohomish and Snoqualmie intervenor groups. 459 F.Supp. at 1058-1060. The district court reserved ruling on this claim pending further hearings. The district court entered an order in August, 1975 granting the Snohomish and Snoqualmie intervenor groups temporary treaty fishing rights to be exercised until the entry of further order with respect to determination of the treaty status of each group. 459 F. Supp.

The Ninth Circuit erred in holding lack of federal recognition to be of no relevance to determination of petitioners' tribal treaty status, but such error was to petitioners' benefit. The error does provide a good reason for this court to decline review, since the grounds petitioners urge as errors are not well taken if federal non-recognition is a relevant factor in a determination of tribal treaty status.

The district court engaged in two logically distinct lines of factual inquiry: whether petitioners are federally recognized tribes; and whether the manner in which intervenor groups live, and historically have lived, is sufficient to

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(footnote 8 continued from page 19:)

at 1057-1058. Such determination was made in this action, which has been the only litigation concerning the tribal status, and treaty status of the off-reservation intervenor groups.

constitute them as tribes. Separate findings resulted from each line of inquiry. There is no indication that the findings from the latter inquiry were influenced by the results of the former inquiry.

The record clearly requires the result reached. Petitioners simply failed to meet their burden of proof. There are large historical periods as to which no proof of tribal status was offered at all. As to the historical periods which petitioners did address, their proof is clearly insufficient.

It was proper for the Ninth Circuit to affirm, on an alternative ground, a result that was clearly supported by the record.

No useful purpose would be served by a principle requiring remand for further findings where the correctness of the

result in the court below is apparent from the face of the record.

This Court should deny review.

ARGUMENT

1. The District Court Decision Reached the Correct Result. Thus, Affirmance Was Required Even if the District Court Gave a Wrong Reason or Ground for its Decision

If the district court's decision is correct, it must be affirmed even if the district court relied upon a wrong ground or gave a wrong reason for the decision. Helvering v. Gowran, 302 U.S. 238, 247 (1937); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943). The court of appeals, and this Court, may sustain a district court judgment on any ground that finds support in the record. Jaffke v. Dunham, 352 U.S. 280 (1957); United States v. Humboldt County, 628 F.2d 549, 551 (9th Cir. 1980).

Petitioners seek to avoid the application of these principles by arguing (1) that the Ninth Circuit articulated a new legal standard for determining tribal status, and that they were entitled to a remand to present new evidence relative to the new standard; and (2) that they were entitled to a remand for new findings on the ground that the district court's findings were "tainted" by application of an erroneous legal standard (a requirement of federal recognition for tribal status), thus removing the findings from the protection of the "clearly erroneous" rule.

The Tulalip Tribes submit that neither of petitioners' contentions is well taken; that the manner of disposition of this matter by the Ninth Circuit does not conflict with any decision or procedure established by this Court, or any of the circuit courts of appeal; and that the

Ninth Circuit's disposition of this matter is simply one of many examples of an appellate court affirming a district court decision on an alternative ground which is supported by the record, and does not warrant this Court's review.

a. No New Legal Standard Was Imposed by the Ninth Circuit

At pp. 25-34 of the Petition for Writ of Certiorari, petitioners argue that a number of decisions of this Court[9] and decisions of the Fifth and Second

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[9] DeMarco v. United States, 415 U.S. 449 (1974); Dandridge v. Williams, 397 U.S. 471, 476, n. 6 (1970); Helvering v. Gowran, 302 U.S. 238, 247 (1937); Forged Steel Wheel Company v. Lewellyn, 251 U.S. 511, 515-516 (1920); Jimenez v. Weinberger, 417 U.S. 628, 637-638 (1974); Alderman v. United States, 394 U.S. 165 (1969); Koled v. United States, 390 U.S. 136 (1968); Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943); New York State Department of Social Services v. Dublino, 413 U.S. 405, 422 (1973).

Circuit Courts of Appeal[10] support a requirement that where a circuit court articulates a new legal standard to be utilized in deciding a factual question, a remand should be had to afford the parties an opportunity to present new evidence relevant to the new legal theory.

The Tulalip Tribes submit that none of the decisions relied upon by petitioners have application to the decisional process which occurred below.

The legal standard against which the Ninth Circuit measured petitioners' treaty status was the standard articulated by the Ninth Circuit in its initial review of United States v. Washington, 520 F.2d 676, at 693 (9th Cir. 1975) that ". . . treaty tribe status is established

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[10] Heirs of Fruge v. Blood Services, 506 F.2d 841, 844 (5th Cir. 1975); Arlinghaus v. Ritenour, 622 F.2d 629, 638 (2d Cir. 1980, cert. den., ____ U.S. ____, 101 S. Ct. 570 (1980).

when 'a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure'". 641 F.2d at 1371. See also 641 F 2d at 1372. Citing this Court's decisions in United States v. Antelope, 430 U.S. 641, 646 (1977), and United States v. Mazurie, 419 U.S. 544, 557 (1975), the Ninth Circuit held that maintenance of tribal status requires that the groups ". . . must survive as distinct communities." 641 F.2d at 1373.

This Court noted in United States v. Sandoval, 231 U.S. 28, 46 (1913), that tribes are "distinctly Indian communities; and stated in The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1867) that tribes are a "people distinct from others." The term "tribe" was defined in Montoya v. United States, 180 U.S. 261, 266 (1901), as:

> A body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . .

These legal standards, and the requirement that an organized tribal structure have been maintained, as previously articulated by the Ninth Circuit, were not unknown to the parties before the district court. To the contrary, they were fully briefed and argued[11], and the district court made separate findings, in

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[11] Indeed, even a cursory review of the record reveals that these issues were litigated before the district court, and there was development of a factual record by the parties concerning these matters; apart from the other evidence received pertaining to the issue of federal recognition. Substantial portions of the record focused on the intervenor groups claims that they had historically existed as tribes since treaty times and were tribes at the time of trial. The "agreed issue" in the case before the district court was whether each intervenor group had maintained an organized tribal structure; and the intervenors positions were that each group had continued to

response to the attention that had been focused on these issues, that the members of the Snohomish and Snoqualmie intervenor groups, as well as their ancestors, do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community, and that their present members have no common bond, residence or association, other than their voluntary affiliation with the intervenor entities. 476 F. Supp. at 1107, 1109 (Findings 36 and 47). Thus, it cannot be said that petitioners were denied an opportunity to present evidence upon the issue which the Ninth Circuit ultimately found to be dispositive.

(Footnote 11 continued from page 27):

maintain a tribal organization historically since treaty times, and that continuously since the signing of the treaties, they had functioned as tribes. See Pretrial Order, ER 44-74, at 5-6. As discussed infra, their proof failed to substantiate their claims.

Accordingly, it was entirely proper for the Ninth Circuit to affirm the district court's decision, on any basis supported by the record, even if the district court erred in an alternative ground (the requirement for federal recognition) stated as a basis for the decision.[12] Helvering v. Gowran, supra; Securities & Exchange Commission v. Chenery Corp., supra; Jaffke v. Dunham, supra.

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[12]While the withdrawal of recognition of a tribe already recognized by the federal government may not result in the loss of vested treaty rights, Menominee Tribe v. United States, 391 U.S. 404, 412-413 (1968); Kimball v. Kallahan, 493 F.2d 564, 568 (9th Cir.), cert. denied, 419 U.S. 1019 (1974); United States v. Washington, 520 F.2d at 693, 641 F.2d at 1371, it is by no means clear that lack of federal recognition is totally irrelevant to the determination of tribal existence in the first instance, where competing groups contend to be the same tribe, and the controversy has not previously been resolved. This Court has indicated the appropriateness of according substantial weight to the recognition of a tribe by Congress or the executive branch, Baker v.

The decisions relied upon by petitioners do not require a contrary conclusion.

(Footnote 12 continued from page 29):

Carr, 369 U.S. 186, 208-11 (1962); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865); and the First Circuit Court of Appeals has recognized the significance of the judgments as to tribal status of officials in the federal executive branch, where tribal status is an issue in the first instance. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir., 1979), cert. den., 444 U.S. 866 (1979); see Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975), where the court found no evidence of Congressional intent to require that a tribe be federally recognized to qualify as a "tribe" within the meaning of the Non-Intercourse Act, 25 U.S.C. § 177, but stated:

> This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this Court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs". United States v. Sandoval, 231 U.S. at 47, 34 S. Ct. at 6, quoting United States v. Holliday, 70 U.S. (3 Wall.) 407, 419, 18 L. Ed. 182 (1965).

None of these decisions[13] has application to what occurred in the decision-making process below.[14] As noted, substantial portions of the factual record developed

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(Footnote 12 continued from page 30):

As noted in the Statement of Facts above, the majority of the members of The Tulalip Tribes are Snohomish; many Snoqualmie went to the reservation and some remained; both the Snohomish and Snoqualmie that lived on the reservation lived as tribes; and the Snohomish and Snoqualmie Indians living on the reservation perceived the organization of The Tulalip Tribes under the Indian Reorganization Act as a confederation of those two tribes. The district court has determined that the Tulalip Tribes are a political successor in interest to "certain" treaty tribes. 459 F. Supp. at 1060. The Tulalip Tribes are a federally recognized tribe. 459 F. Supp. 1020, 1039 (Finding 255); and RT 10/29/75 pp. 380-82. See also discussion of this issue infra at 36.

[13] See footnotes 9 and 10.

[14] DeMarco v. United States, supra, merely held that a remand was appropriate instead of a de novo factual determination in the court of appeals of a question that had not been decided in the first instance by the district court. Dandridge v. Williams, supra, merely noted that it may

before the master and the district court went to the issues of whether their tribal organizations had been maintained, and whether their groups met the definitions of Indian tribes previously articulated by this Court; and the district court made express findings on these matters.

(Footnote 14 continued from page 31):

be appropriate to remand to obtain a lower court's views on the controlling issue, where those had not previously been expressed, but indicated that this was not the case where the issue had been fully argued to the lower court, although affirmance was upon a different ground than that relied upon by the lower court. See also, Helvering v. Gowran, supra, where remand was found appropriate on a new theory raised and accepted for the first time on appeal, where there had been no opportunity to present evidence on the new theory to the court below. This Court indicated that there was no need for a remand for a new trial when only a reversal on a proposition of law was involved, Forged Steel Wheel Co. v. Lewellyn, supra. A remand was had in Jiminez v. Weinberger, supra, where the district court had improperly upheld, against an equal protection claim, a statutory preclusion of certain social security benefits, and thus had not reached the question of whether, if the exclusion were

b. The District Court's Views Concerning the Requirement of Federal Recognition Do Not Require a Different Disposition Than That Reached by the Ninth Circuit

The district court made a finding that the members of each intervenor group and their ancestors:

> . . . do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity.

(Footnote 14 continued from page 32):

invalid, as this Court found, the claimants would meet other statutory qualifications to receive the benefits. Remand was had to determine whether such other statutory qualifications were met. In Alderman v. United States, supra, remand occurred because factual issues arose after the district court's disposition of the action, based upon newly discovered evidence, and the district court had not made factual findings to resolve the new disputes. Kolod v. United States, supra, involves exactly the same fact pattern, issues and result as Alderman. The language relied upon by petitioners in Securities & Exchange Comm. v. Chenery

See, e.g., Finding 36 (Snohomish) and Finding 47 (Snoqualmie). 476 F. Supp. 1107, 1109.

The district court made separate findings concerning the intervenor group's lack of recognition as tribes by federal authorities. See, e.g., Finding 35 (Snohomish, and Finding 45 (Snoqualmie).

The separate findings on these issues were the result of two distinct lines

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(Footnote 14 continued from page 33):

Corp., supra, merely states the familiar rule that an appellate court should not make a de novo determination of fact. In Heirs of Fruge v. Blood Services, supra, remand for trial on the issue of negligence was ordered, where it was held the district court had erroneously granted summary judgment for defendant on the grounds of charitable immunity, and the questions of negligence were not raised on the summary judgment motion. In Arlinghaus v. Ritenour, supra, the Second Circuit noted that it could sustain the lower court decision on any theory supported by the record, but observed that where the appellate court raises the decisive theory on its own, it should tread cautiously to be sure that the parties had full opportunity to develop

of inquiry engaged in by the district court: whether these groups were federally recognized; and whether these groups, historically and presently, have lived as a continuous separate, distinct and cohesive Indian cultural or political community. The lines of inquiry are logically distinct from each other. One is an inquiry concerning whether the manner in which these groups live and have lived is sufficient to constitute them as "tribes"; and the second is an

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(Footnote 14 continued from page 34):

relevant facts in the court below, which the Second Circuit found to have occurred. The Tulalip Tribes submit that such opportunity was present in the instant case. In New York State Department of Social Services v. Dublino, supra, remand was had to allow the district court to rule upon some subsidiary questions of federal preemption, which had not been reached, due to the district court's erroneous broader ruling that the legislation in question had been entirely preempted.

examination of how each group was viewed by federal authorities.

Since the two lines of inquiry are logically distinct, it is difficult to perceive how the district court's conclusions on one line of inquiry (federal recognition) "infected" its conclusions on the other line of inquiry (continuous separate, distinct and cohesive Indian cultural or political communities). Indeed, if the district court viewed federal nonrecognition as decisive, and still engaged in an inquiry concerning whether these groups have lived as continuous separate, distinct and cohesive Indian cultural or political communities, it is difficult to see why the district court would have engaged in the latter inquiry if the answer to the inquiry was pre-ordained by the fact that intervenors were not federally recognized.

Thus, whether or not the conclusions of law articulated the correct legal standards[15], it does not appear from examination of the findings that the district court's conclusions concerning federal recognition influenced the results of the inquiry as to whether intervenor groups have lived as continuous separate, distinct and cohesive Indian cultural or political communities.

Unlike Kelley v. Southern Pacific Company, 419 U.S. 318 (1974), this is not a case where the district court applied the wrong legal standard, and also failed to make findings pertinent to the legal standard ultimately found to be correct. In Kelley, remand occurred because the district court had made no findings

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[15]See footnote 12 supra concerning the propriety of considering federal recognition in a determination of tribal status in the first instance.

whatsoever on the issue which this court ultimately found to be dispositive.

Nor is this a case where the basic factual disputes between the parties involved issues of credibility, and the trial court's resolution of these issues turned upon errors of law such as an erroneous determination as to which party properly had the burden of proof. E.g. Owen v. Commercial Union Fire Ins. Co. of New York, 211 F.2d 488, 489 (4th Cir. 1954).

The basic facts introduced in evidence by the parties below were not in conflict. There were no real credibility issues in the case. This was not a case involving controverting testimony. The dispute below was as to the significance of the fasic facts presented, not as to which parties version of the basic facts was correct. The dispute was not as

to the accuracy of petitioners' evidence, but rather as to its sufficiency.

The Tulalip Tribes submit that, leaving aside all evidence below pertaining to the question of federal recognition, the state of the record is such that the district court could not properly have drawn any conclusion other than that petitioners have not functioned since treaty times as continuous separate, distinct and cohesive Indian cultural or political communities.

As noted in the Statement of Facts above, there is evidence that the Snohomish and Snoqualmie which came to the reservation had leaders and resided there as tribes, until the 1934 reorganization under the Indian Reorganization Act, which the reservation Indians perceived as a confederation of the two tribes.

However, there was no evidence to demonstrate that the off-reservation

Snohomish and Snoqualmie Indians lived in any distinctly Indian community, or lived united in a community under one leadership or government and inhabited a particular, even ill-defined, territory, Montoya v. United States, supra, from treaty times to the present. Compare the detailed factual inquiry that occurred in Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir., 1979), cert. den., 444 U.S. 866 (1979) pertaining to the question of tribal existence during each relevant historical period. The record in the instant case is devoid of similar evidence produced by petitioners to show that they have continuously met the qualifications of an Indian tribe from treaty times to the present; or even at any specified time.

Although petitioners attempted to show that their members had continuously lived in a manner that would have constituted them as tribes, they principally

relied upon the assertion that they benefited from a presumption of continuing existence because their members were descendants of members of the tribes which were treaty signatories. This assertion begs the question of whether petitioners are tribes which are successors to the tribes which were treaty signatories. As the Ninth Circuit observed, petitioners cannot benefit from any presumption of continuing existence until they have proven that they are the tribes that existed at treaty times. 641 F.2d at 1374. When petitioners' burden of proof argument was rejected[16], and it was held that petitioners had the burden of proving that they are the tribes that existed at treaty times, or successors

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[16]Petitioners do not challenge the rulings below as to the allocation of the burden of proof.

thereof, 641 F.2d at 1374[17], petitioners found themselves in the position of having the burden of proof, but having offered insufficient evidence to meet that burden, on the issue of continuous tribal status from treaty times through the present.

As noted in the Statement of Facts, there is no evidence that the Snohomish and Snoqualmie intervenor groups have lived in any particular, or even ill-defined, territory, Montoya v. United States, supra. The evidence discussed in the Statement of Facts indicates that the members of the intervenor Snohomish and Snoqualmie groups are scattered far and wide, and are not settled in any particular region that could be called a distinctly Indian community. Thus, they

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[17] See also Mashpee, supra, 592 F.2d at 588-90, holding that a party asserting tribal status has the burden of proving such status at each relevant date.

lack the communal cohesiveness that comes from a group living in close physical proximity. The evidence discussed in the Statement of Facts also indicates that members of these groups have intermarried with non-Indians, and that many of the members have a very low quantum of Indian blood. Even if these people did reside together in a distinct community, given such low blood quantums, it is not certain that there would be anything distinctly "Indian" about the community.

Nor was there any evidence that the intervenor groups have, or have historically had, leadership or government which causes their members to order their lives in any significant way[18]. As noted in the Statement of Facts, these

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[18]See the "leadership" requirement in Montoya v. United States, supra; and the liberal treatment of the leadership requirement by the district court in Mashpee, as discussed by the First Circuit, 592 F.2d at 584. The leadership

groups have no power to enforce the fishing ordinances they have enacted. Their only real group activities have been concerned with the claims cases. The organization formed in the 1920s to pursue claims activity was mostly comprised of on-reservation Indians and disbanded when that claim was lost in 1935. The presently constituted intervenor organizations were formed to pursue individual members treaty claims, and meetings of these organizations have been primarily concerned with the claims cases. It is submitted that having an elected "leadership" of a litigation organization is far

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(Footnote 18 continued from page 43):

requirement imposed by the district court in Mashpee was of a leadership which controlled significant elements of the people's lives; a leadership which caused the people to order their lives in some significant way. Id. This leadership test may not be as restrictive as this Court's statement in Montoya (that a group must be united in a community under one leadership or government) would require.

different than being "united in a community under one leadership or government" for purposes of being a body politic that constitutes a people distinct from others.

As the Ninth Circuit observed, the evidence presented by petitioners was insufficient to establish even the continuous informal cultural influence they concede is required to constitute their groups as tribes. 641 F.2d at 1373. The record simply does not provide a basis for concluding that petitioners groups are more than private, voluntary ethnic organizations. Such organizations do not constitute Indian tribes. United States v. Mazurie, supra, 419 U.S. at 557. See also Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309-310 (1866).

Where it is apparent on the face of the record that the evidence is insufficient to meet petitioners' burden of proof

as to tribal status for relevant historical periods, it is difficult to see what purpose would be served by a remand for further findings. The Ninth Circuit has done nothing more than sustain a district court decision on an alternative ground supported by the record. Helvering v. Gowran, supra; Securities & Exchange Comm. v. Chenery Corp., supra; Jafke v. Dunham, supra.

The establishment of a principle that would require a remand for further findings, where the result is clearly supported by the record, would serve no useful judicial purpose. The requested Writ of Certiorari should not be granted.

2. The Ninth Circuit's Decision Does Not Conflict With This Court's Decision In Menominee Tribe v. United States or With Decisions of the First Circuit

Petitioners assertion that the Ninth Circuit's decision conflicts with this

court's decision in Menominee Tribe v. United States, 391 U.S. 404 (1968) and the First Circuit's decisions in Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979) and Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) involves the implicit assertion that the Ninth Circuit was correct in its determination that federal recognition is irrelevant to a determination of tribal status for purposes of determining that a group is the tribe which has treaty rights; and an explicit assertion that the Ninth Circuit, having expressly stated that federal recognition is not a relevant criteria, 641 F.2d at 1371, ignored its express statement, in effect, by imposing criteria for tribal status that can only be met by groups which are federally recognized tribes.

As to the implicit assertion, that the Ninth Circuit was correct in its

determination concerning the non-relevance of federal recognition to a determination of tribal status, see footnote 12, supra. It is submitted that the Ninth Circuit erred in holding that federal recognition is of no significance to a determination of tribal status in the first instance. In Menominee, there was no question that the Menominee Tribe had been a tribe historically. The only issue was whether the Menominee Indian Termination Act of 1954, 68 Stat. 250, had abrogated the Tribe's hunting and fishing rights. This Court's refusal to impute an intent to Congress to abrogate those hunting and fishing rights, from enactment of the Termination Act which effectively withdrew federal recognition of the Tribe, 391 U.S. at 412-413, does not indicate that the presence or absence of federal recognition is to be accorded no significance

where the tribal status of a group is initially in question.

Similarly, while Bottomly found that an unrecognized tribe might still possess sovereign immunity, the decision does not stand for the proposition that the presence or absence of federal recognition is a factor of no significance where a group's tribal status is in doubt in the first instance.

In Joint Tribal Council of the Passamaquoddy in was stipulated that the members and the ancestors of the group claiming to be a tribe, although not recognized by the federal government, have constituted a tribe in both the racial and cultural sense since at least 1776. 528 F.2d at 373, 376-377. The decision does not stand for the proposition that if tribal status were in doubt in the first instance, that the question of federal recognition would be of no significance to

a determination of tribal status. In holding that a non-recognized tribe may be a tribe for purposes of the Indian Non-Intercourse Act, 25 USC § 177, the court in Joint Tribal Council made the observations quoted supra in footnote 12, to the effect that if tribal status was in doubt, judgments of officials in the federal executive branch might be of great significance, referring to this Court's statements that it is the rule for the courts to follow the executive and other political departments of the government whose more special duty is to determine such affairs. 528 F.2d at 377.

However, the Ninth Circuit's error in holding that federal recognition was of no relevance to an initial determination of petitioners' tribal status, was to petitioners' benefit, and, thus, does not provide a basis for this Court's review; although it does provide a substantial

reason for this Court to deny issuance of a Writ of Certiorari, since petitioners' assertions herein are dependent upon the propriety of the Ninth Circuit's determination concerning the lack of relevance of federal non-recognition to petitioners' tribal status.

Petitioners' more explicit assertion, that the criteria imposed by the Ninth Circuit are, in effect, sub silentio requirements of federal recognition, asks this Court to ignore the Ninth Circuit's express statements that federal recognition is not a relevant factor in determining petitioner's tribal treaty status. 641 F.2d at 1371-1372.

Moreover, examination of the inquiries made by the Ninth Circuit, in reviewing the record to determine if the district court's dispositive findings were supported by the evidence, does not reveal that criteria were imposed that could be

satisfied only by federal recognized tribes.

As noted supra, in Section 1b, the record does not contain evidence that the intervenor groups have, or have historically had, leadership or government which causes its members to order their lives in any significant way. The record is simply devoid of evidence that these groups have had any such influence on the lives of the members. The Ninth Circuit does not say that the type of control or influence required is such that could only come from tribes with reservations; or even that it treated the lack of any governmental control over the lives of the members as a dispositive factor (although some showing of a leadership or government that influenced the lives of the members should be a dispositive requirement under Montoya). It was simply one of various factors examined by the Ninth Circuit.

Nor did the Ninth Circuit's inquiry as to whether the intervenor groups had settled in distinctively Indian residential areas indicate that such a requirement could only be met by tribes with reservations. Rather, the Ninth Circuit's inquiry flows directly from this court's statements that tribes are "distinctively Indian communities", United States v. Sandoval, supra; "a people distinct from others", The Kansas Indians, supra; and inhabit "a particular though sometimes ill-defined territory", Montoya v. United States, supra. The Ninth Circuit expressly indicates that it engaged in its inquiry concerning whether intervenor groups had survived as distinct communities, based upon this Court's statements in United States v. Antelope, 430 U.S. 641 (1977) and United States v. Mazurie, 419 U.S. 544 (1975). 641 F.2d at 1373. The Ninth Circuit did not state

that petitioners must have a reservation to satisfy this criteria. Indeed, the Ninth Circuit has previously found the Stillaguamish to be a tribe which possesses treaty fishing rights, although they are not federally recognized and do not have a reservation. United States v. Washington, 520 F.2d 676 (9th Cir. 1975).

Petitioners assertions are, in effect, arguments that they may be tribes without evidence that they constitute, and have historically constituted, distinct Indian communities.

3. The Court of Appeals' Decision is not Inconsistent With this Court's Decision in United States v. John

Contrary to petitioners assertion (Petition for Writ of Certiorari at 55), United States v. John, 437 U.S. 634 (1978) does not alter the definitional requirement that tribes be "distinctly Indian communities". In United States v. John,

the United States had actually taken lands in trust for the Choctaw Indians, and subsequently proclaimed that land to be a reservation. 437 U.S. at 646. While the State of Mississippi asserted that the Choctaws had become fully assimilated into the political and social life of the state, and that the long lapse in federal recognition of a tribal organization in Mississippi had removed the basis for federal jurisdiction under the commerce clause over the later established reservation lands, this Court observed that Mississippi had made no effort to support its assertion with evidence of assimilation. 437 U.S. at 652 n. 23. United States v. John does not set forth legal standards for determining whether total assimilation has occurred. It merely notes the absence of evidence offered by the state in this regard. Contrary to petitioners claims, United States v. John does

not provide a basis for comparing the degree of assimilation of the Mississippi Choctaws with that of petitioners' herein.

CONCLUSION

The disposition of this case by the Ninth Circuit was in accordance with established principles of law. No issues meriting this Court's attention are presented. Review should be denied.

DATED this 13th day of October, 1981.

Respectfully submitted,

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BELL & INGRAM
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The Tulalip Tribes of
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APPENDIX A

LIST OF PARTIES TO THIS PROCEEDING

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Opposition

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No. 81-509

In the Supreme Court of the United States

OCTOBER TERM, 1981

DUWAMISH TRIBE, ET AL., PETITIONERS

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a case where the court of appeals found that the district court applied, in part, an incorrect standard in determining that certain groups are not Indian tribes entitled to treaty fishing rights, the court of appeals could affirm the result based upon its own review of the record, rather than remanding for additional findings.

2. Whether the court of appeals majority opinion conflicts with *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), by requiring the petitioners to show that they are federally-recognized tribes, where the court of appeals' opinion explicitly states that federal recognition is not a requirement.

3. Whether *United States* v. *John*, 437 U.S. 634 (1978), has any bearing on the question of whether certain groups claiming to be Indian tribes may exercise treaty fishing rights.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 641 F. 2d 1368. The findings of fact and conclusions of law of the district court (Pet. App. A27-A66) are reported at 476 F. Supp. 1101.

JURISDICTION

The judgment of the court of appeals (Pet. App. B7-B8) was entered on April 22, 1981. Petitions for rehearing were denied on June 5, 1981 (Pet. App. B3-B4). An order extending the time for filing a petition for a writ of certiorari until September 11, 1981, was granted by Justice Rehnquist on August 21, 1981. The petition for a writ of certiorari was filed on September 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is a discrete chapter in the continuing litigation over Indian fishing rights in western Washington. In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit in federal district court seeking an injunction requiring the State to protect those tribes' share of runs of anadromous fish. In 1974, the district court held that tribes which had signed treaties ceding much of their aboriginal lands were entitled under the treaties to take up to fifty percent of the harvestable fish on runs passing through their traditional off-reservation fishing grounds. *United States* v. *Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F. 2d 676, 682 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).[1] Soon after the district court's initial decision, several groups, including the petitioners, intervened seeking declarations that they were tribes entitled to treaty fishing rights. The United States, as well as the State of Washington and various federally-recognized tribes, opposed the claims pressed by the five petitioners, none of which is recognized as an Indian tribe by the United States.

2. The question whether the petitioners are tribes entitled to treaty fishing rights was referred to a master. After hearing testimony and receiving exhibits, the master determined that they are not (see Pet. App. A5 n.4). The district court neither accepted nor rejected the master's findings, but, at petitioners' request, elected to conduct a new evidentiary hearing. Ultimately, the district court, having received voluminous documentary evidence, briefs, and live testimony, adopted as its own the findings of fact and conclusions of law proposed by the United States (Pet. App. A27-A66).

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[1]The district court's interpretation of the treaties was substantially upheld by this Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 685 (1979).

Many of those findings were effectively undisputed. Thus, it was stipulated that each of the petitioners is composed primarily of persons who are descendants in some degree of Indian tribes who were parties to either the Treaty of Point Elliot (Samish, Duwamish, Snohomish, and Snoqualmie) or the Treaty of Medicine Creek (Steilacoom). Findings of Fact Nos. 13, 22, 31, 40, 50 (Pet. App. A37-A59). These treaties provided that the signatory tribes, which ceded most of their aboriginal lands to the United States, would remove to small reservations within one year, if the means were furnished them (Pet. App. A28). Accordingly, some members of the Duwamish Tribe moved to the Port Madison, Muckleshoot and other reservations, some Samish members moved to the Lummi and Swinomish Reversations, some Snohomish and Snoqualmie members moved to the Snohomish Reservation (later absorbed into the Tulalip Reservation), and some Steilacoom members moved to the temporary Fox Island Reservation and later to the Nisqually and Puyallup Reservations. Findings of Fact Nos. 14, 23, 32, 41, 51 (Pet. App. A38-A59). Some descendants of these original tribes, therefore, are presently members of such federally-recognized tribes as the Tulalips, Lummis, Swinomish, etc. But the reservations being relatively crowded and in some cases distant from the aboriginal homes of the Indians, the United States did not insist upon removal and a significant number of the members of the original tribes did not go to the reservations, and some who went later left (Pet. App. A28-A29). The petitioners are composed primarily of descendants of original tribal members who stayed off the reservations, and the basic issue was whether these descendants today qualify as "tribes" succeeding to the fishing rights secured to their ancestors by the mid-Nineteenth Century treaties just mentioned.

There was virtually no evidence introduced with respect to these off-reservation Indians for the period between the 1850's when the treaties were signed, and around 1915.

Between 1916 and 1919 the Bureau of Indian Affairs caused an enrollment to be made of unattached Indians in western Washington arranged by families and tribal ancestry (Pet. App. A31-A32). The agent performing this task found that many of these individuals had not associated with any tribe for several decades or generations, had taken up the habits of non-Indian life, and lived in non-Indian communities. Findings of Fact Nos. 2, 5 (Pet. App. A29-A32).

Beginning in the 1920's a number of off-reservation descendants of treaty tribes banded together to press claims against the United States for breach of the treaties. While these efforts initially met with failure, each of the five petitioners successfully prosecuted claims before the Indian Claims Commission in the early 1970's. Findings of Fact Nos. 11, 15, 24, 33, 42, 53 (Pet. App. A36-A61). Evidence showed that the petitioners' primary function in the 20th century has been to press these claims. See Exhibits USA-115 at 1 and USA-119 at 1-2; H.R. Rep. No. 92-148, 92d Cong., 1st Sess. 16, 22 (1971); Transcript of Oct. 28, 1975 District Court hearing at 131-132; Finding of Fact No. 52 (Pet. App. A60). However, these judgments were not owned by the petitioners, but by individuals determined by the Secretary of the Interior to be descendants of members of treaty-time tribes. Moreover, claims before the Indian Claims Commission may be brought on behalf of Indian tribes which have ceased to exist (Pet. App. A36-A37).

The district court concluded that the members of each of the five petitioners, as well as their recent ancestors, did not live and had not lived as continuous, separate, distinct and cohesive Indian cultural or political communities. Findings of Fact Nos. 18, 27, 36, 47, 55 (Pet. App. A41-A63). This conclusion was supported by findings that these groups allow persons to be members who have only 1/8th Indian blood, or even less in some instances, and that present members have no common bond of residence or association,

other than their voluntary affiliation with the petitioners. Findings of Fact Nos. 17, 18, 26, 34, 43, 54 (Pet. App. A41-A63). The court also found that none of the petitioners exercised attributes of sovereignty over its members or over any territory and that none of these groups was recognized by the United States as an Indian political or governmental entity. Findings of Fact Nos. 16, 25, 35, 45, 54 (Pet. App. A40-A63). While the intervenors had had dealings with federal, state, and local entities, these dealings were not different in substance from those engaged in by any social or business entity. Findings of Fact Nos. 19, 28, 37, 46, 56 (Pet. App. A42-A62).

In its conclusions of law, the district court set out six "relevant factors" for determining "whether a group of persons have maintained Indian tribal relations * * *"(Pet. App. A63-A64). These included:

> [T]he extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community, the extent of Indian governmental control over their lives and activities, the extent and nature of the members' participation in tribal affairs, the extent to which the group exercises political control over a specific territory, the historical continuity of the foregoing factors, and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians.

With respect to the final factor of express acknowledgment by federal authorities, the court noted that "the determination of what entities may exercise political control over communal rights secured by treaties * * * is a political question requiring determination or concurrence by the political authorities of the United States," and further that only tribes "recognized as Indian political bodies by the

United States" may exercise treaty fishing rights. Conclusions of Law Nos. 3, 4 (Pet. App. A64-A65).

The district court concluded that none of the petitioners is at this time an Indian tribe, and that none, therefore, holds treaty fishing rights (Pet. App. A66). Motions for reconsideration were denied on April 24, 1979.

3. The court of appeals affirmed (Pet. App. A1-A19). The majority concluded that the district court applied, in part, an incorrect legal standard by holding that only tribes recognized as Indian political bodies by the United States could possess treaty fishing rights (Pet. App. A8). The court of appeals noted, however, that the district court had considered factors besides federal recognition (Pet. App. A9-A10).

The majority pointed out that tribes must "survive as distinct communities" if they are to exercise treaty rights, since these rights are communal rather than individual (Pet. App. A15). It must be shown that "some defining characteristic of the original tribe persists in an evolving tribal community" (Pet. App. A12). With regard to these five groups, the district court had found that they had not functioned since treaty times as " 'continuous separate, distinct and cohesive Indian cultural or political [communit[ies].' " Pet. App. A16, quoting from Findings of Fact Nos. 18, 27, 36, 47, 55 (Pet. App. A41-A63). The court of appeals majority concluded, after "close scrutiny," that the evidence supported this finding (Pet. App. A16). The evidence, according to the majority, established that the petitioners had not controlled the lives of their members either through formal sanctions or through informal cultural influence (Pet. App. A16). The evidence also showed that petitioners' members had intermarried with non-Indians and had not settled in distinctly Indian residential areas (Pet. App. A16-A17). The critical finding of the district court regarding the lack of

political and cultural cohesion was thus not clearly erroneous. Circuit Judge Canby dissented.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

1. The court of appeals concluded that the district court applied, in part, an incorrect standard, by requiring federal recognition as a prerequisite to exercise of treaty fishing rights. The court of appeals was nevertheless able to affirm, since the district court had also found, and the evidence supported the finding, that the petitioners had not met the correct standard for tribal existence.[2] The petitioners' primary contention before this Court is that the court of appeals, having found an error of law, should have remanded the case for additional findings, rather than affirm on an alternative ground.

It is established beyond question that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); see also *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435

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[2]The court of appeals characterized the correct standard as requiring that a tribe has "survive[d] as [a] distinct communit[y]," which may be shown by evidence that "some defining characteristic of the original tribe persists in an evolving tribal community" (Pet. App. A12, A15). The district court's finding that members of the five petitioners and their ancestors "do not and have not lived as * * * continuous separate, distinct and cohesive Indian cultural or political communit[ies]," while not phrased in precisely the same terms, covers the same ground as the court of appeals' standard. Both formulations are consistent with statements by this Court that tribes are "distinctly Indian communities," *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913), which are "united in a community under one leadership or government and inhabiting a particular though sometimes ill-defined territory * * *," *Montoya* v. *United States*, 180 U.S. 261, 266 (1901).

(1924); *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). While petitioners do not directly attack this rule, they argue (Pet. 26) it should not apply where "there are seriously disputed issues of fact, and * * * the circuit court [has] articulated a new legal standard to be used in deciding the factual question." But there is no such exception.

Accepting that the court of appeals applied a new standard, it does not follow that a remand is necessarily required. This Court's opinion in *United States* v. *Holt State Bank*, 270 U.S. 49, 55-57 (1926), makes clear that a reviewing court may affirm on the basis of a legal standard not raised or discussed below, even where the issue turns on a review of conflicting evidence. The lower courts in *Holt State Bank* erroneously treated the issue of whether a lake was navigable as a question of local law. This Court, despite finding that the lower courts applied a "wrong standard" (270 U.S. at 56), nevertheless affirmed the lower courts' holding that the lake was navigable. This Court reviewed the "conflicting" (*ibid.*) evidence in the record and determined that it supported a finding of navigability under federal law. *Holt State Bank* thus illustrates the wide power of a reviewing court to determine whether anything in a record supports a judgment.

Petitioners' cases are easily distinguished. Several of them stand for the proposition that a reviewing court should remand for further findings where a suggested ground for affirmance presents entirely new factual issues not considered below. See *DeMarco* v. *United States*, 415 U.S. 449, 450 (1974); *Helvering* v. *Gowran, supra*, 302 U.S. at 247; *Dandridge* v. *Williams*, 397 U.S. 471, 476 n.6 (1970) (dicta); *Heirs of Fruge* v. *Blood Services*, 506 F. 2d 841, 844 (5th Cir. 1975). In this case, the factual issue of whether petitioners maintained the necessary cultural and political cohesion over the years was extensively litigated below, and

considered by the district court. While petitioners may have wished for more specific findings of fact on the defining characteristics of the original tribe or on their present degree of assimilation (Pet. 31), they cannot claim that these matters were not thoroughly aired before the district court. Thus, cases such as *DeMarco* are not applicable.

Petitioners' reliance (Pet. 27-28) on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is equally unavailing. That case reaffirms the rule that the decision of a lower court must be affirmed, if correct, even if the lower court relied upon a wrong ground or gave a wrong reason. 318 U.S. at 88. *Chenery* distinguishes the situation where the decision being reviewed is that of an administrative agency or a jury. In the case of an administrative agency, a court of appeals may generally not affirm on an alternative ground, since only the agency has statutory authority to make particular determinations of judgment or policy. *Chenery, supra,* 318 U.S. at 88. In the case of a jury, the Seventh Amendment prevents appellate courts from reexamining the facts to find an alternative ground for affirmance. But in this case the usual rule on alternative grounds applies, since the court of appeals was not reviewing a decision of an agency or a jury but the findings of a trial court. See *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948).[3]

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[3]Petitioners also rely upon a host of cases where remands were ordered, but only because reviewing courts had reversed or vacated the judgments below. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Alderman* v. *United States*, 394 U.S. 165 (1969); *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Kolod* v. *United States*, 390 U.S. 136 (1968). These cases have no bearing on the question whether a remand is required where a reviewing court affirms despite finding a legal error.

2. Petitioners next assert (Pet. 45) that the court of appeals implicitly required them to show federal recognition, and that this conflicts with *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Petitioners charge that even though the court of appeals explicitly denied the relevance of federal recognition, the court's criteria for establishing tribal status are so strict that they cannot be met by unrecognized tribes. This claim is insubstantial.

In affirming the district court's finding that petitioners had not functioned as continuous, separate, distinct and cohesive Indian cultural or political communities, the court of appeals noted (Pet. App. A16) that the groups' governing bodies "have not controlled the lives of the members." Petitioners claim that the court was, in effect, requiring federal recognition. To the contrary, the court was simply noting the absence of evidence that the petitioners' governing bodies had exercised any significant influence over tribal matters.[4] Tribes need not be federally-recognized to exercise such influence. See, *e.g.*, *Mashpee Tribe* v. *New Seabury Corp.*, 592 F. 2d 575, 582-585 (1st Cir. 1979). But there must be some showing of continuous leadership over the years, even if that leadership has been solely with respect to a way of life. *Id.* at 584-585. Petitioners simply failed to make this necessary showing.[5]

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[4]The requirement that the petitioners' governing bodies exert some significant leadership is consistent with the case law. See, *e.g.*, *Montoya* v. *United States*, 180 U.S. 261, 266 (1901); *Mashpee Tribe* v. *New Seabury Corp.*, 592 F. 2d 575, 582-585 (1st Cir. 1979).

[5]Petitioners allege (Pet. 48) that they "managed" the off-reservation fishing of their members before the filing of this case. The evidence was to the contrary (see, *e.g.*, Transcript of Dec. 18, 1974 Master's hearing at 110-111). In any event, petitioners do not appear to claim that the district court's findings regarding lack of governmental control are clearly erroneous.

Petitioners also charge (Br. 49) that the court of appeals effectively required federal recognition by focusing on the fact that petitioners' members "have not settled in distinctively Indian residential areas" (Pet. App. A16-A17).[6] Petitioners complain that they cannot reasonably be required to show the same sort of Indian community as would exist on a reservation. However, there is no evidence that the court of appeals meant "Indian residential areas" to be the equivalent of reservations. If petitioners had produced any evidence to support their present assertion (Pet. 50) that "the overwhelming percentage of the petitioners' members continue to occupy their aboriginal territory," this showing might well have been significant. There was, however, no such evidence tendered; the record showed instead that petitioners' members are scattered throughout western Washington, as well as other states (Transcript of Dec. 18, 1974 Master's hearing at 177-178; see also Transcript of Oct. 29, 1975 District Court hearing at 307-308, 312).

Petitioners fail to show that the court of appeals required, *sub silenti*, a showing of federal recognition. There is thus no need to reach the question of the extent to which *Menominee* would preclude consideration of federal recognition as a factor in determining tribal existence.

3. Petitioners' claim that the opinion below conflicts with *United States* v. *John*, 437 U.S. 634 (1978), is also insubstantial. Petitioners argue (Pet. 55) that they are no more assimilated than the Mississippi Choctaws considered in *John*, and that they are therefore entitled to the same tribal status as the Choctaws. But *John* did not consider the question, at issue here, whether a particular group of people is an Indian tribe. The Choctaws were recognized as a

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[6]The propriety of this factor is confirmed by *United States* v. *Sandoval*, *supra*, 231 U.S. at 46; and *Montoya* v. *United States*, *supra*, 180 U.S. at 266.

tribe by the United States,[7] and had been provided a reservation. The only question was whether the Choctaw Reservation was "Indian Country" within the meaning of the Major Crimes Act, 18 U.S.C. 1153, given that federal supervision over the Choctaws had not been continuous. 437 U.S. at 652-653. *John* did not articulate standards for determining when a non-recognized group of Indians is a tribe, and thus has no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7]While recent cases have indicated that the federal government's failure to recognize a tribe is not dispositive, see Pet. App. A8 and cases there cited, positive recognition by the United States is accorded great deference and may well be controlling. *Baker* v. *Carr*, 369 U.S. 186, 215 (1962); *United States* v. *Sandoval*, 231 U.S. 28, 47 (1913). Accordingly, should petitioners (or some of them) succeed in obtaining "acknowledgment" of their current status as "Indian tribes" in the pending administrative proceedings (see Pet. 22-23), this might justify an application to re-open the present judgment against them.

Petitioner's Reply Brief

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OCTOBER TERM 1981

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TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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NO. 81 - 509

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

DUWAMISH, et al.,
Petitioners,

v.

STATE OF WASHINGTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF DUWAMISH, SAMISH, SNOHOMISH, SNOQUALMIE, and STEILACOOM TRIBES

This case involves the abrogation of Indian treaty rights. Contrary to the law established by this Court, the abrogation of petitioners' treaty rights was accompanied neither by a clear statement of Congress nor a finding that the petitioners had voluntarily

abandoned their rights. Rather, the courts below applied the improper legal standard advanced by the United States. Justice requires that the decision below be set aside and the case remanded.

It is conceded by all parties and the courts below that each petitioning tribe is composed of people tracing their ancestry to Indians who negotiated treaties with the United States in which the right to fish was reserved. (U.S. Brief at 3). All parties agree that the petitioners continued to live outside of reservations at the direction and with the encouragement of the United States. Id. The United States in its brief impliedly concedes that membership requirements of petitioners in many cases equal or exceed the Indian blood quantum of tribes which are "recognized" by the United States. (U.S. Brief at 4). Yet, despite these undisputed facts, the courts below have abrogated the treaty fishing rights of petitioners.

1. The Decision Below Is Contrary To This Court's Holding In United States v. Holt State Bank.

There is no doubt that the district court applied the wrong legal standard when initially considering this case.[1/] The United States now characterizes the issue as not whether the wrong legal standard was applied, but whether the appellate court cured the error by

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1/ The appellate court first recognized that the district court had applied an improper legal standard. It noted the erroneous conclusion (Petitioners' Brief at A-8) that:

> Only the tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing right secured and protected by the treaties of the United States.

The appellate court went on to find that:

> The district court's statement that federal recognition is decided together with its listing of other purported considerations, makes it difficult for us to determine the precise basis for the court's holding that the tribes may not exercise treaty rights. Moreover, although some of the other considerations mentioned by the district court may be relevant, they do not adequately define the controlling principles.

(See Appellants' Brief at A-11).

independently reviewing the evidence. (U.S. Brief at 8). In this regard the United States relies on United States v. Holt State Bank, 270 U.S. 49 (1926) and attempts to distinguish SEC v. Chenery Corp., 318 U.S. 80 (1943). (U.S. Brief at 8-9). Holt Bank and Chenery taken together establish that the appellate court exceeded its jurisdiction when it did not remand this case to the district court.

Chenery requires a remand where the correction of the lower court's decision depends on a determination of fact. Although this Court in Chenery talked in terms of jury findings, it appears clear that the policy behind the decision was to ensure that where a lower court's factual determinations are tied to an improper legal standard, the trial court has a new opportunity to reconsider all of the evidence in light of the proper law. Thus, even where the court acted without a jury, a remand is required so that the court can review all of the offered evidence and make new findings based on the right law.

Maggio v. Zertz, 333 U.S. 56 (1948)(when a misapprehension of the law led both courts below to adjudicate rights without considering essential facts in light of the controlling law, the court will vacate and remand to the district court.)

This case fits squarely within the policy of Chenery. The question of whether a tribe has maintained its tribal organization is a factual one. Moreover, the legal standard adopted by the lower court (that federal recognition was dispositive) limited the type and amount of evidence considered by the district court.[2/] The application of the correct legal standard will greatly affect the nature and direction of the fact finder's inquiry. A remand is required.

Holt Bank holds that a lower court's decision may be upheld - even if based on the wrong law - if a review of the record dis-

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2/ The court not only determined that the district court had applied the wrong law; it admitted that from the record it was not possible to identify an alternative legal theory that the district court could have applied.

closes that a remand of the case would result in the same decision. But, under Holt Bank, if the appellate court is to reconsider the case, it must act as the trier of fact. The Court there made its own factual conclusion from viewing the evidence. It did not rely on the lower court's findings. Holt Bank at 57. See United States v. Singer Manufacturing Co., 374 U.S. 174, 194 (1963). It cannot limit its inquiry to the findings made by the lower court because those have been made without full regard for the proper legal standard and do not consider evidence considered irrelevant under the defective standard. The clearly erroneous test does not apply. Singer, supra. Thus, the entire record must be reconsidered by the appellate court.[3/] In effect,

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3/ The efficacy and justice of requiring a remand is well evidenced by examining this appeal. All parties pick and choose bits of evidence and present that evidence to the reviewing court. Courts do not have sufficient information to act, yet are always asked to take on the role of the trier of fact. To require the reviewing courts to act as quasi fact finders with an incomplete record, as was done here, is to invite the kind of miscarriage of justice suffered by the petitioners.

a review de novo is required.

This task, however, is impossible where there are disputed facts.[4/] Not all of the evidence before the district court is before the appellate court; it cannot make the necessary independent factual inquiry, even if it cares to. The result is that the court does not review the record as required in Holt Bank; rather it reviews only the findings made by the district court. Yet, those findings resulted from a view of the evidence affected by an improper legal standard. In this case the appellate court reviewed the findings of the lower court. There is no indication that the court considered all of the evidence or the full record.

Once it was determined that the wrong legal standard had been applied and the case involved disputed facts, it was improper for the appellate court not to remand as a matter of law. See, United States v. United States

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4/ It should be noted that in Holt Bank this Court resolved the factual dispute before making its analysis. Holt Bank at 56.

Gypsum Co., 333 U.S. 364, 394 (1948). However, even if it was proper for the appellate court to engage in an independent factual inquiry, the record does not disclose and the decision below does not indicate that the appellate court did so. If it did, it had only a partial record available for review.

2. The Decision In Mashpee v. New Seabury Corporation Does Not Establish The Proper Burden Of Proof.

The United States relies on the legal standard in Mashpee Tribe v. New Seabury Corporation, 592 F.2d 575 (1st Cir. 1975). (U.S. Brief at 10). Mashpee is not properly applied to this case, and to the extent that it might be applied, it is misapplied by the United States.

In Mashpee the trial court gave jury instructions which ensured that the jury understood that federal recognition was not a prerequisite to tribal existence. Thus, the factual findings made in Mashpee are not tainted by the introduction of an improper

legal standard. This is contrary to the instant case. Thus, while the legal standard established in Mashpee might be correct, it was never applied here because the district court accepted that recognition is a prerequisite to the exercise of fishing rights.

More importantly, the instant case is distinguished from Mashpee in that here a treaty fishing right is involved. The treaty is evidence that in 1855 the United States acknowledged the petitioners and their existence. This evidence raises the presumption that the tribes continued to exist and shifts the burden to the challenging parties to prove that such existence ceased. 5/

5/ See 31A CJS Evidence §124(1) at 222-225; 29 Am Jur. 2d Evidence §237 at 285.

It has been held that a conspiracy once proved to exist is presumed to continue. United States v. Perlstein, 126 F.2d 789 (3rd Cir. 1942), cert denied, 316 U.S. 678 (1942); that a previously proved parental relationship is presumed to endure, Bearhart v. United States, 82 F.Supp. 652 (D.Minn. 1949); that one proved not to have been the sole owner of the stock continued not to be, Hertz v. Record Publishing Company of Erie, 219 F.2d 397 (3rd Cir. 1955), cert denied, 349 U.S. 912 (1955); that a person proved to be an owner of a car continued to be the owner, United States v. One

(footnote continued on next page)

Petitioners have established that they were parties to treaties with the United States and that they are composed primarily of individuals who trace their ancestry to those treaty signatories. Establishment of prior existence and the treaty right triggers the presumption of continued existence.

Contrary to Mashpee, petitioners here do not carry the burden of showing their continued existence. The burden shifts to the United States to show either a congressional act destroying that existence or knowing abandonment.[6/] See, Fort Berthold Indians v. United States, 71 Ct.Cl. 308, 334 (1930).

The United States has the burden to demonstrate that its policy of assimilation was successful. It failed to carry that burden.

1954 Cadillac 2-Door Sedan, 135 F.Supp. 1 (W.D.Mo. 1955); that a business engaged in interstate commerce continued to be so engaged, National Labor Relations Board v. J.G. Boswell Company, 136 F.2d 585 (9th Cir. 1943); and that a union once found to be a legitimate bargaining representative for the workers continued to be such, National Labor Relations Board v. National Motor Bearing Company, 105 F.2d 652 (9th Cir. 1939).

6/ That these tribes continued to exercise treaty fishing rights is ample proof that the United States failed to abrogate the treaties.

Moreover, the district court improperly placed upon the petitioners the burden of proving a lack of abandonment. This burden was particularly difficult given that the United States had control over the evidence relating to the period 1855 through about 1910.[7/]

3. The District Court And Court Of Appeals Failed To Follow This Court's Direction In Menominee Tribe v. United States.

This court taught in Menominee v. United States, 391 U.S. 404 (1968), that treaty rights cannot be lost through inadvertence or nonspecific legislative direction. See, Fort Berthold Indians v. United States, 71 Ct.Cl. 308, 334 (1930). In this case, there was no finding that Congress abrogated petitioners'

7/ The United States complains most strongly about an alleged lack of petitioners' evidence to prove their existence between 1855 and 1910 (U.S. Brief at 3). The United States has put forward no evidence from its records to show abandonment during the period 1855-1910. In effect, the United States complains that the Tribes have failed to prove a negative (that they did not abandon) with evidence uniquely controlled by the United States.

treaty rights, that the tribes voluntarily abandoned their tribal relations, or that they were assimilated into the "greater" society. The United States' effort to circumvent the requirements of Menominee is misplaced. (U.S. Brief at 10).

Rather than focusing on evidence that would prove or disprove tribal organization, the district court fastened on the concept that the absence of recognition preordained the abrogation of the treaty right. This improper legal standard was introduced by the United States and its wrong application was advanced by the United States throughout this case.[8/] Thus, once the United States testified

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8/ In its effort to administratively control Indian rights the United States cannot be accused of consistency. In the instant case the United States continually argued that recognition is a prerequisite to the exercise of treaty fishing rights. (See, U.S. Brief at page 12, footnote 7). However, the United States in Short v. United States, F.2d ( ) (United States Court of Claims, September 23, 1981), argues as follows:

> The defendant [United States] recognized that there is no existing organizational or functional tribal entity. It urges, however, that the Yurok Tribe has existed

(footnote continued on next page)

that it did not recognize the petitioners for statutory services, the court's inquiry stopped and its standard was established. All the court then needed to do was sign the findings of fact and conclusions of law offered by the United States. This it did.[9/]

The United States argues, in effect, that the problem is with petitioners for their failure to submit evidence. (See U.S. Brief at 8, 11). This argument is disingenuous. The problem was not lack of evidence submitted, but the failure of the district court to con-

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> for many years as a conceptual entity and suggests that if the motion to substitute is granted, the individual Yurok Indians soon will create an appropriate tribal organization.

Slip Op. ____. The diametrically opposed positions maintained by the United States in the Short case and in the instant case can only be explained by its belief that it can administratively affect - even eliminate - vested property rights through manipulation of the court system.

9/ In the instant case the United States has taken no action to recognize or not recognize petitioners. Whatever deference the courts might give to federal action, the lack of action can never accomplish an abrogation of a treaty right. Yet this is the proposition advanced by the United States and accepted below. (See U.S. Brief at 12, footnote 7).

sider the evidence in light of its conclusion that the only relevant factor was whether the petitioners were recognized. As the record shows, evidence submitted and not considered was voluminous.[10/] Moreover, as the United

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10/ Examples of the court's omissions are plentiful. The district court made no reference to the fact that the Snoqualmie Tribe was offered a reservation in the late 1940's. The United States steadfastly and forcefully argued that the Snoqualmie Tribe should be the recipient of a reservation. (Exhibit USA-118 at 65). Yet, the district court felt disinclined to even mention, let alone distinguish, such clear evidence of "continuing existence."

The district court made no mention of the fact that the United States provided members of petitioner tribes with blue fishing identification cards which allowed those members to exercise fishing rights. The blue cards were based upon membership lists compiled by the petitioners. The district court ignored the fact that until the decision in United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974) aff'd 520 F.2d 676 (9th Cir. 1975) cert denied 423 U.S. 1086 (1975), members of petitioning tribes exercised their treaty fishing rights to the same extent as members of every other tribe - recognized or not.

Finally, the district court made no reference to the fact that the only expert witness to testify in the case--Dr. Barbara Lane, a witness the United States employed--testified unequivocably on behalf of each of the petitioners that each petitioner had in fact maintained its tribal organization. This conclusion was based on her independent review of all of the anthropological, historic, and ethnographic material available.

States admits, new evidence is now available to assist the fact finder on remand.

The United States argues that the result might have been different if the petitioning tribes had presented evidence that they continued to occupy their aboriginal territory. The United States maintains that there was "no such evidence rendered." U.S. Brief at 11. The record is to the contrary. Except for tribal members who were serving their country in the armed forces, members of the petitioning tribes primarily occupied their aboriginal territory in Western Washington.[11/] The tran-

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11/ The best and most reliable evidence on this point is that of Dr. Barbara Lane, the anthropologist employed by the United States to prepare a detailed anthropological study on each of the petitioners. She testified on the continued existence and residency of each tribe. For example, on the Samish Tribe Dr. Lane wrote:

> "members of the Samish Indian Tribe live in Northwestern Washington in or near the traditional territory of the aboriginal Samish."

Ex. USA-75 at 1.

And, for the Snoqualmie Dr. Lane wrote:

"...it is clear the Bureau of Indian
(footnote continued on next page)

script references in U.S. Brief at page 11 are either totally irrelevant to the issue of residence (Tr. Oct. 29, 1975 at 307, 308, 312) or incomplete representations. (Tr. Dec. 18, 1974 at 177-178. Compare USA-104.)

Petitioners were denied a fair opportunity to present their evidence and have the matter considered in light of the correct legal standard.

4. Conclusion.

The United States has accepted a special trust relationship to Indian tribes long recognized and protected by this Court. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The trust relationship requires the United States to insure that the more vulnerable Indian tribes are protected from the overreaching of third parties. United States

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Affairs has regarded the Snoqualmie Tribe to be resident in its traditional territory."

Ex. USA-104 at 8.

These, of course, are merely examples of evidence apparently now considered critical by the United States, but left unconsidered below.

v. Kagama, 118 U.S. 357 (1886); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965). The United States, too, is constrained to act fairly toward Indian tribes. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 74 (1977); United States v. Sioux Nation, 48 U.S.L.W. 4960 (1980).

This case represents a situation where it was possible for the trial court to fully and fairly consider the relevant evidence. The United States failed to carry out its duty toward Indians, thus facilitating the errors identified below.

As important is the practical consequence that members can no longer exercise their trade or right. Subsequent to the decision in the circuit court, members of petitioners who had previously fished under the treaty right sought state licenses. They learned that state law now makes it impossible for them to obtain a state license. Indians who have always earned their living by exercising their treaty fishing rights now have no fish-

ing rights at all -- Indian or non-Indian.

Remand in this case is simplified by the continuing jurisdiction of the district court. No new parties, service, or other interference with judicial activities will be required. Moreover, remand would not be an idle or futile effort. During the six years between the original trial and this date, the petitioning tribes have continued to gather evidence new in substance and quantity which would be available to the district court.

The equities of this case, as well as the law, require that this petition be granted and that the case be remanded for further proceedings consistent with the law.

DATED this 22nd day of December, 1981.

Respectfully submitted,

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